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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 554

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION AND MUTUAL BROADCASTING SYSTEM, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED NOVEMBER 30, 1942.

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

(Equitable Relief Sought)

Civil Action No. 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and Stromberg Carlson Telephone Manufacturing Company, Plaintiffs,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, Defendants

COMPLAINT

To the Honorable the Judges of said District Court:

Plaintiffs, above named, bring this action pursuant to the provisions of the Communications Act of 1934, approved June 19, 1934 (48 Stat. 1064, 1093; Code of Laws of the United States, Title 47, Section 402(a)) and the Urgent Deficiencies Act, approved October 22, 1913 (38 Stat. 219, 220; Code of Laws of the United States, Title 28, Sections 41 and 43 through 48, inclusive), and under the general equitable jurisdiction of this Court, to enjoin, set aside, annul and suspend an Order of the Federal Communications Commission (hereinafter sometimes referred to as the "Commission"), dated May 2, 1941, as amended on October 11, 1941, in proceedings entitled: "In the Matter of the Investigation of Chain Broadcasting, Federal Communications Commission, Docket No. 5060." The Order as issued May 2, 1941 (hereinafter sometimes called the "original Order") was effective immediately except with respect to existing contracts, arrangements or understandings or network organization station licenses and, by amendment of June 13, 1941, except with respect to the maintenance of more than one network by a single network organization. The Order as amended on October 11, 1941 (hereinafter sometimes called the "Order on Rehearing") was immediately effective except with respect to existing contracts, arrangements or understandings, network organization sta-

[fol. 2] tion licenses and the maintenance of more than one network by a single network organization. Insofar as the original Order and the Order on Rehearing were immediately effective, there has been no postponement of effective date. As a result of successive postponements (on July 22, August 28, and October 11, 1941), the effective date of said Order, as amended, has been postponed until November 15, 1941 with respect to contracts, arrangements and understandings existing on May 2, 1941 and network organization station licenses, and the effective date of said Order, as amended (hereinafter sometimes called "the Order"), has been suspended indefinitely with respect to the maintenance of more than one network by a single network organization.

Plaintiffs allege, upon information and belief:

1. Plaintiff, National Broadcasting Company, Inc. (hereinafter called NBC), is a corporation duly organized and existing under the laws of the State of Delaware, having its principal office in the City of New York, State of New York, and in the Southern District thereof.

2. Plaintiff, Woodmen of the World Life Insurance Society (hereinafter called Woodmen), is a corporation duly organized and existing under the laws of the State of Nebraska, having its principal office in the City of Omaha, State of Nebraska and licensed to transact its corporate business in the States of Nebraska and New York.

3. Plaintiff, Stromberg Carlson Telephone Manufacturing Company (hereinafter called Stromberg Carlson), is a corporation duly organized and existing under the laws of the State of New York.

4. The Commission is an administrative tribunal created by said Communications Act of 1934 and is charged with the administration and enforcement of said Act. The Commission was organized on July 11, 1934 and said Act in so far as it relates to action by the Commission became effective on that date.

5. The United States of America is made a defendant in this suit pursuant to the provisions of said Act of Congress approved October 22, 1913 (36 Stat. 1149, 38 Stat. 219; Code of Laws of United States, Title 28, Section 46), known as the Urgent Deficiencies Act, and said Communications

[fol. 3] Act of 1934, approved June 19, 1934 (48 Stat. 1064, 1093; Code of Laws of the United States, Title 47, Section 402(a)).

6. NBC is, and at all times since the effective date of said Communications Act of 1934 has been, a corporation engaged in radio broadcasting and in radio network broadcasting in interstate and foreign commerce and subject to the provisions of said Act.

7. Woodmen and Stromberg Carlson, respectively, are, and at all times hereinafter referred to have been, engaged respectively, in radio broadcasting and in radio network broadcasting in interstate or foreign commerce and subject to the provisions of said Communications Act of 1934.

8. NBC is the owner and operator (under licenses from the Commission) of the following standard broadcast stations, each of which it has been continuously licensed to operate since the date indicated:

Station	Location	Date
WEAF	New York, N. Y.	1926
WJZ	New York, N. Y.	1930
WRC	Washington, D. C.	1930
WTAM	Cleveland, Ohio	1930
KPO	San Francisco, Calif.	1932
WMAQ	Chicago, Ill.	1931
WENR	Chicago, Ill.	1931

NBC acquired Station WJZ from Radio Corporation of America which had become sole owner of said station on or about May 15, 1923 and had used the same as its key station for network broadcasting, beginning as early as December, 1923.

9. NBC is the lessee and operator (under licenses from the Commission) of the following standard broadcast stations, each of which it has been continuously licensed to operate since the date indicated:

Station	Location	Date
KOA	Denver, Colo.	1930
KGO	San Francisco, Calif.	1930
WMAL	Washington, D. C.	1933

[fol. 4] 10. The license for each of the Stations operated by NBC (except that for Station WEAF, New York, N. Y., which was acquired prior to the enactment of the Radio Act of 1927) has been acquired after NBC made application to the Federal Radio Commission (the predecessor of the Federal Communications Commission as a licensing authority) for a transfer thereof to NBC, and in each instance the Federal Radio Commission acting under the provisions of Section 12 of the Radio Act of 1927 (44 Stat. 1167) granted its consent to the assignment of the license to NBC as requested after having found that public interest, convenience or necessity would be served thereby. In each instance NBC has been granted successive renewals of these licenses (for example, NBC has received 28 renewals of its license for station WEAF for periods ranging between approximately three months and one year) both by the Federal Radio Commission and the Federal Communications Commission upon findings as required by statute (44 Stat. 1167; 48 Stat. 1085) that the public interest, convenience or necessity would be served thereby. NBC is now, and at all times since 1927 has been, qualified legally, financially, technically, by experience and in all other respects to operate each of said stations.

11. The broadcast transmitters operated by NBC, as aforesaid, exclusive of studios and other properties, represent an investment by NBC in assets (other than good will) having a present value of over $1,000,000. All of the stations operated by NBC are going concerns which during their many years of operation by NBC have created values for NBC in excess of $1,000,000, in good will and NBC has also paid large sums of money for the good will value of certain of said stations at the time the same were acquired by NBC.

12. Woodmen is the owner and operator (under a license from the Commission) of standard broadcast station WOW, located at Omaha, Nebraska, which Woodmen has been licensed to operate since 1923.

13. Woodmen has been granted successive renewals of its license to operate Station WOW by said Federal Radio Commission since its creation in 1927 and by the Commission since its creation in 1934 upon findings, as required by statute (44 Stat. 1167; 48 Stat. 1085), that the

[fol. 5] public interest, convenience or necessity would be served thereby, and Woodmen is now, and at all times since 1923 has been, duly qualified, legally, financially, technically, by experience and in all other respects to operate said station.

14. Station WOW, owned and operated by Woodmen as aforesaid, represents an investment by Woodmen in assets (other than good will) having a present value in excess of $175,000, and said Station WOW is a going concern which, during its 18 years of operation by Woodmen, has created values for Woodmen of over $500,000 in good will.

15. Stromberg Carlson is the owner and operator (under a license from the Commission) of standard broadcast station WHAM, located at Rochester, New York, which Stromberg Carlson has been licensed to operate since 1927.

16. Stromberg Carlson acquired said Station WHAM by purchase from the prior owner and operator thereof. Stromberg Carlson has been granted successive renewals of its said license to operate Station WHAM both by said Federal Radio Commission since its creation in 1927 and by the Commission since its creation in 1934 upon findings, as required by statute (44 Stat. 1167; 48 Stat. 1085), that the public interest, convenience or necessity would be served thereby.

17. Stromberg Carlson is now, and at all times since 1927 has been, duly qualified, legally, financially, technically, by experience and in all other respects to operate said Station WHAM.

18. Station WHAM, owned and operated by Stromberg Carlson as aforesaid, represents an investment by said Stromberg Carlson in assets (other than good will) having a present value in excess of $250,000, and said Station WHAM is a going concern which, during its 14 years of operation by Stromberg Carlson, has created values for Stromberg Carlson of over $1,000,000 in good will.

19. In addition to its operation of radio broadcast stations, as aforesaid, NBC is and since 1926 has been engaged in the business of network broadcasting; i.e., it creates and supplies programs over leased telephone wire circuits simultaneously to stations which NBC itself operates and

[fol. 6] to standard broadcast stations (now numbering more than 200) owned and operated by other persons, firms, or corporations in the United States and Canada. NBC maintains studios and offices in New York, Washington Chicago, Los Angeles, and other important cities within the United States from which it conducts its said business of network broadcasting and also maintains offices and has employees in many other cities and countries throughout the world. NBC's employees include experienced engineering, sales, program and executive personnel, the total number thereof being in excess of 2,300, many of whom have entered into contracts of employment with NBC requiring NBC to pay out large sums of money as salaries thereunder. NBC owns real property and leases additional real property within and without the United States and is the owner of personal property used and usable in the conduct of its broadcasting and network broadcasting business. NBC's commitments under leases of real property alone are in excess of $15,000,000. The present value of studio, office and other properties and assets, owned by NBC (exclusive of broadcast transmitters and good will) is in excess of $3,000,000, and its network activities have created good will va-ues of more than $10,000,000 additional.

20. NBC's business of network broadcasting is conducted by means of contracts between NBC and the operators of independently owned standard broadcast stations, including Woodmen and Stromberg Carlson, on the one hand and between NBC and advertisers on the other hand. NBC has contracts with the owners of most of the standard broadcast stations which broadcast NBC's network programs (except those stations which NBC itself operates) which fix the rights and obligations of the parties in the handling and broadcasting of such programs as hereinafter more fully appears. NBC has contracts with advertisers and advertising agencies for the use of NBC's network facilities to advertise their products, covering advertising commitments, subject to the provisions of said contracts, in an amount in excess of $28,000,000. NBC has contracts with artists and other skilled personnel to produce and distribute its radio programs to its affiliated network stations pursuant to such contracts.

21. NBC's ability to render a national network service is dependent upon the contracts existing between it and

[fol. 7] the owners of independently owned standard broadcast stations which broadcast its network programs. The ability of the owners of standard broadcast stations affiliated with NBC, including Woodmen and Stromberg Carlson, to furnish their respective listeners with NBC's network programs, both commercial and sustaining, is also dependent upon said contracts. Said contracts are in writing and while similar in substance are not in all respects uniform. In most cases, they provide in effect that for the period of time therein specified: (1) NBC will supply to the station sustaining programs (*i. e.*, programs of entertainment, information, education, news, national and international events and other features not containing advertising material), which programs NBC either itself produces in its own studios and delivers to the station, or delivers to the station from some other point at which the program originates; (2) the station will broadcast commercial programs serving the public interest, convenience and necessity supplied by NBC (*i. e.*, programs of entertainment, information, education, news and other features but also containing advertising material) to the station and NBC will pay the station for the broadcasting of such programs at a rate specified; and (3) the station grants to NBC an option on certain specified periods of the time for which the station is licensed to operate, for the broadcast of commercial network programs. Said provisions are contained in each of said contracts substantially in the form contained in the form of affiliation contract attached hereto as Exhibit A and made a part hereof as fully as though the same were set out herein.

22. Through and by means of the contractual relationship between NBC and individual station owners who broadcast NBC's network programs, including Woodmen and Stromberg Carlson, NBC is now able to render a nationwide network service which has gained wide public acceptance and which is relied upon by NBC's affiliated stations both as a source of revenue and as a source of program material. Through such contractual arrangements, the affiliated stations, including WOW and WHAM, receive: (1) the audience appeal of programs supplied by NBC and which are not otherwise available to the individual stations; (2) sustaining programs which are used by the individual stations to complete their program schedules thereby sav-

[fol. 8] ing them the expense of producing programs for this purpose; and (3) revenue for the sale of the facilities of the stations to advertisers by NBC. Through such contractual arrangements, NBC receives: (a) circulation for commercial programs within the particular market in which the individual station is located; (b) revenue for making such stations available to an advertiser using the network; and (c) an opportunity to build audience appeal in a particular market through the use of NBC's sustaining programs by the station located in that market.

23. NBC's network operations are and since 1927 have been conducted over two groups of standard broadcast stations which are commonly known, and hereafter referred to, as the "Red" and "Blue" networks. In broadcasting radio programs, the Red network and the Blue network generally operate as separate networks, and one program will be broadcast from the group of stations comprising the Red network while a different program is simultaneously broadcast from the group of stations comprising the Blue network, although in exceptional cases the Red and Blue networks may be combined to broadcast the same program. Each of these networks is national in scope so that there is a substantial overlap in the territories served by them. The stations which NBC itself operates are divided between the Red and Blue networks in the following manner:

Red Network	Location	Blue Network
WEAF	New York, N. Y.	WJZ
WMAQ	Chicago, Ill.	WENR
WRC	Washington, D. C.	WMAL
KPO	San Francisco, Cal.	KGO
KOA	Denver, Colo.	—
WTAM	Cleveland, Ohio	—

All of the stations which are owned and operated by others but which are affiliated with NBC in the business of network broadcasting are associated with the Red network or the Blue network or both. Station WOW is associated with the Red network and Station WHAM is associated with the Blue network. The map-chart attached hereto as Exhibit B, which is made a part hereof as fully as though it were set out herein, shows the network association as of June 1, 1941 of all stations owned and operated by, or affiliated with, NBC. As shown by the legend on Exhibit B,

[fol. 9] stations colored red therein are associated with the Red network, stations colored blue therein are associated with the Blue network and stations colored green therein are included in supplementary groups of stations which from time to time may be associated with the Red or Blue networks.

24. NBC, Woodmen and Stromberg Carlson, respectively, allege that each of the stations that they, respectively, operate has been operated in accordance with all applicable statutes and all lawful regulations promulgated by the Commission and that each of said stations is now and at all times referred to herein has been rendering a high quality broadcast service, in accordance with the terms and provisions of the licenses authorizing its operation and in all respects conducive to the public interest, convenience and necessity.

25. NBC further alleges that its contracts with its affiliates, including Woodmen and Stromberg Carlson, are in all respects lawful, are contracts under which NBC and said affiliates are co-venturers in the business of network broadcasting and are contracts under which both NBC and said affiliates have been able to render a greater service in the public interest than would have been possible without such contracts.

26. The Commission on March 18, 1938 entered its Order No. 37, of the same date, which authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity," a copy of which Order is attached hereto as Exhibit C and made a part hereof as fully as though it were set out herein. Hearings were thereafter held and the Commission entered a Report setting forth its findings and conclusions and its original Order in Docket No. 5060, dated May 2, 1941, upon notice to NBC and other interested parties, a copy of which Report and Order is attached hereto as Exhibit D and made a part hereof as fully as though it were set out herein.

27. By the terms and provisions of its original Order in Docket No. 5060, the Commission promulgated eight regulations of general application which purport to be "special regulations applicable to radio stations engaged in

[fol. 10] chain broadcasting," having the force and effect of law. Two of the seven Commissioners dissented. On September 12, 1941, upon notice to NBC and other interested parties, a rehearing was held and thereafter, on October 11, 1941, the Commission issued a Supplemental Report and the Order on Rehearing in Docket No. 5060, amending three of the eight regulations aforesaid, a copy of which Report and Order is attached hereto as Exhibit E and made a part hereof as fully as though it were set out herein. Again, two Commissioners dissented. A copy of the eight regulations promulgated on May 2, 1941, as amended October 11, 1941, is attached hereto as Exhibit F and made a part hereof as fully as though the same were set out herein. All broadcast stations operated by and affiliated with NBC, including Stations WOW and WHAM, are standard broadcast stations engaged in chain broadcasting. All of said regulations have application to the business in which NBC, Woodmen and Stromberg Carlson, respectively, are engaged, either as the operator of one or more broadcast stations or in the conduct of NBC's network business, and all of said regulations adversely affect NBC, Woodmen and Stromberg Carlson.

28. Paragraph 3.101 of the original Order requires the abrogation of any provision contained in any contract, arrangement or understanding between NBC and any standard broadcast station whereunder said station agrees not to broadcast network programs of any network organization other than NBC and said paragraph was not amended by the Order on Rehearing.

29. Paragraph 3.102 of the original Order, as amended by the Order on Rehearing, requires the abrogation of any provision in any contract, arrangement or understanding between NBC and any standard broadcast station whereunder said station obtains exclusive rights in a particular area to the programs of NBC, provided that NBC may grant to a station first call upon the programs of NBC in the station's primary service area.

30. Paragraph 3.103 of the original Order required the abrogation of any provision in ~~any contract,~~ arrangement or understanding between NBC and any of its affiliated standard broadcast stations providing for their affiliation for a period of longer than one year.

[fol. 11] 31. Paragraph 3.103 of the Order on Rehearing requires the abrogation of any provision in any contract, arrangement or understanding between NBC and any of its affiliated standard broadcast stations providing for their affiliation for a period longer than two years.

32. Paragraph 3.104 of the original Order required the abrogation of any provision in any contract, arrangement or understanding between NBC and any of its affiliated standard broadcast stations, whereunder said station gives NBC a firm option on any part of said station's broadcast time.

33. Paragraph 3.104 of the Order on Rehearing also requires the abrogation of any provision in any contract, arrangement or understanding between NBC and any of its affiliated standard broadcast stations whereunder said station gives NBC a firm option on any part of said station's broadcast time. Said paragraph prohibits the station from agreeing to clear its time of non-network programs for NBC upon less than 56 days notice and prohibits the station from agreeing to clear its time of the programs of other network organizations for NBC under any circumstances. Substantially all contracts between NBC and its affiliated standard broadcast stations, including NBC's contract with Woodmen and NBC's contract with Stromberg Carlson, contain a provision giving a firm option to NBC on the respective station's time for not less than eight hours per day upon 28 days notice.

34. Paragraph 3.105 of the original Order requires the abrogation of any provision in any contract, arrangement or understanding between NBC and any of its affiliated standard broadcast stations which does not reserve to said station the right to reject any network program which said station reasonably believes to be unsatisfactory or unsuitable and said paragraph was not amended by the Order on Rehearing. Substantially all contracts between NBC and its affiliated standard broadcast stations, including NBC's contract with Woodmen, contain a provision reserving to said station the right to reject any network program solely upon the ground that the broadcasting thereof would not be in the public interest, convenience and necessity.

[fol. 12] 35. Paragraph 3.108 of the original Order requires the abrogation of any provision in any contract, ar-

rangement or understanding between NBC and any of its affiliated standard broadcast stations whereunder said station is prevented or hindered from or penalized for fixing or altering its rates for the sale of broadcast time for other than said networks' programs and said paragraph was not amended by the Order on Rehearing.

36. The necessary effect of the Order is to require the abrogation or modification of each of the contract provisions between NBC and its affiliated standard broadcast stations described in paragraphs 33 and 34 of this complaint. The Order also prevents the inclusion of any contract provision substantially similar to any of those described in paragraphs 28 through 35, inclusive, of this complaint in any new contract between NBC and any standard broadcast station. Such requirements as imposed by the Commission in the Order would disrupt the ordinary course of NBC's, Woodmen's and Stromberg Carlson's respective businesses, as corporations engaged in radio broadcasting and radio network broadcasting, would damage NBC by loss of revenues in an amount in excess of $1,000,000 per year and would damage Woodmen and Stromberg Carlson, respectively, by loss of revenues under their affiliation contracts with NBC in an amount in excess of $100,000 per year each.

37. Paragraph 3.106 of the original Order requires NBC to dispose of (a) all standard broadcast stations in excess of one covering substantially the same service area and (b) any standard broadcast station in any locality where existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency or other related matters) that "competition would be substantially restrained" by the continued ownership of said station by NBC and said paragraph was not amended by the Order on Rehearing. NBC presently operates two stations covering substantially the same service area in each of four cities within the United States, namely, New York, Washington, Chicago and San Francisco. NBC also operates a single station in two other cities, namely, Cleveland and Denver, which said stations in terms of coverage, power, frequency, program quality and in other respects are pre- [fol. 13] ferred by listeners and by advertisers over some, if not all, of the other stations located in such cities.

38. The necessary effect of paragraph 3.106 of the Order, as the Order is construed by the Commission in its Report (Exhibit D), is to require NBC to dispose of not less than four of the stations owned or operated by NBC. Such requirement as imposed by the Commission in the Order would terminate or would disrupt and injure NBC's business as a corporation engaged in radio broadcasting and in radio network broadcasting and would disrupt and injure Woodmen's and Stromberg Carlson's respective businesses as corporations engaged, respectively, in radio broadcasting and in radio network broadcasting, all to the damage of NBC by loss of revenues in an amount in excess of $1,000,000 per year and to the damage of Woodmen and Stromberg Carlson.

39. Paragraph 3.107 of the original Order requires each and every standard broadcast station affiliated with a network organization which maintains more than one network, if such networks are operated simultaneously or if there is a substantial overlap in the territory served by the group of stations comprising each such network, to terminate such affiliation. NBC is a network organization within the meaning of Paragraph 3.107 and the Red and Blue networks now operated by NBC are nation-wide in scope, are operated simultaneously, and there is a substantial overlap in the territory served by the Red and Blue networks, respectively.

40. The necessary effect of paragraph 3.107 of the Commission's Order in Docket No. 5060 would be to require the operator of each and every standard broadcast station affiliated with NBC, including Woodmen and Stromberg Carlson, to terminate its contract of affiliation with NBC, or, in the alternative, to require NBC to dispose of its Red or its Blue network. As hereinabove stated, the effective date of paragraph 3.107 was indefinitely postponed by the Commission on October 11, 1941, but the assertion of power by the Commission contained in paragraph 3.107 has the necessary effect of rendering uncertain and less valuable the operation by NBC of both its Red and its Blue networks and this effect has not been alleviated by the indefinite postponement of the effective date of said paragraph. Such asser- [fol. 14] tion of power by the Commission, notwithstanding the indefinite postponement of said effective date, will in-

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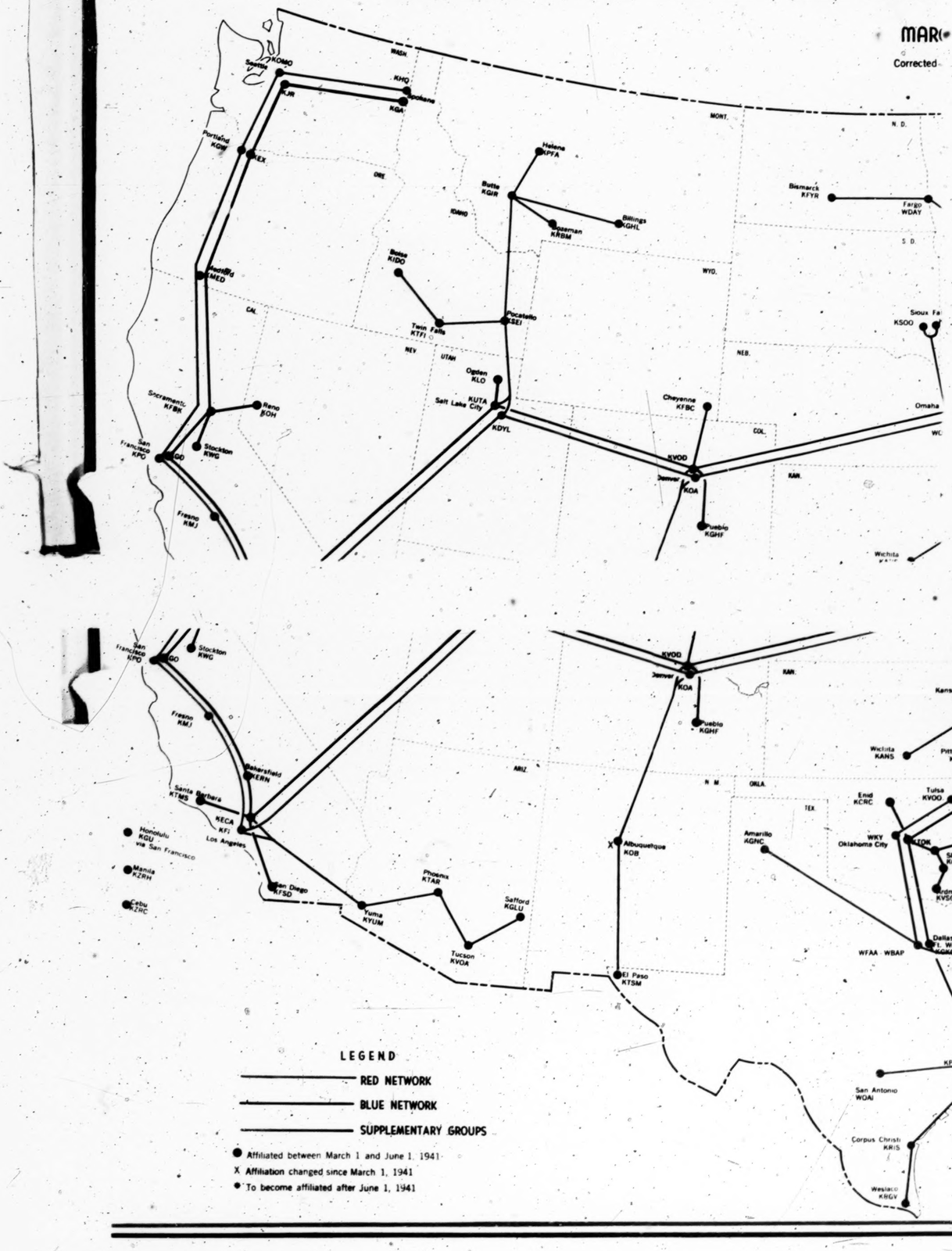
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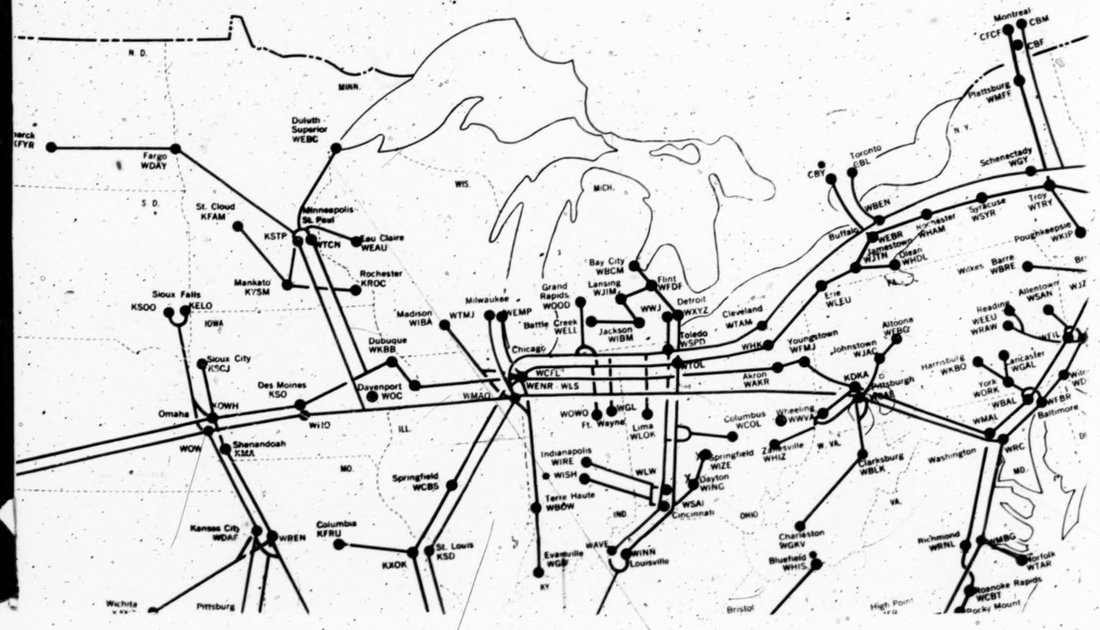
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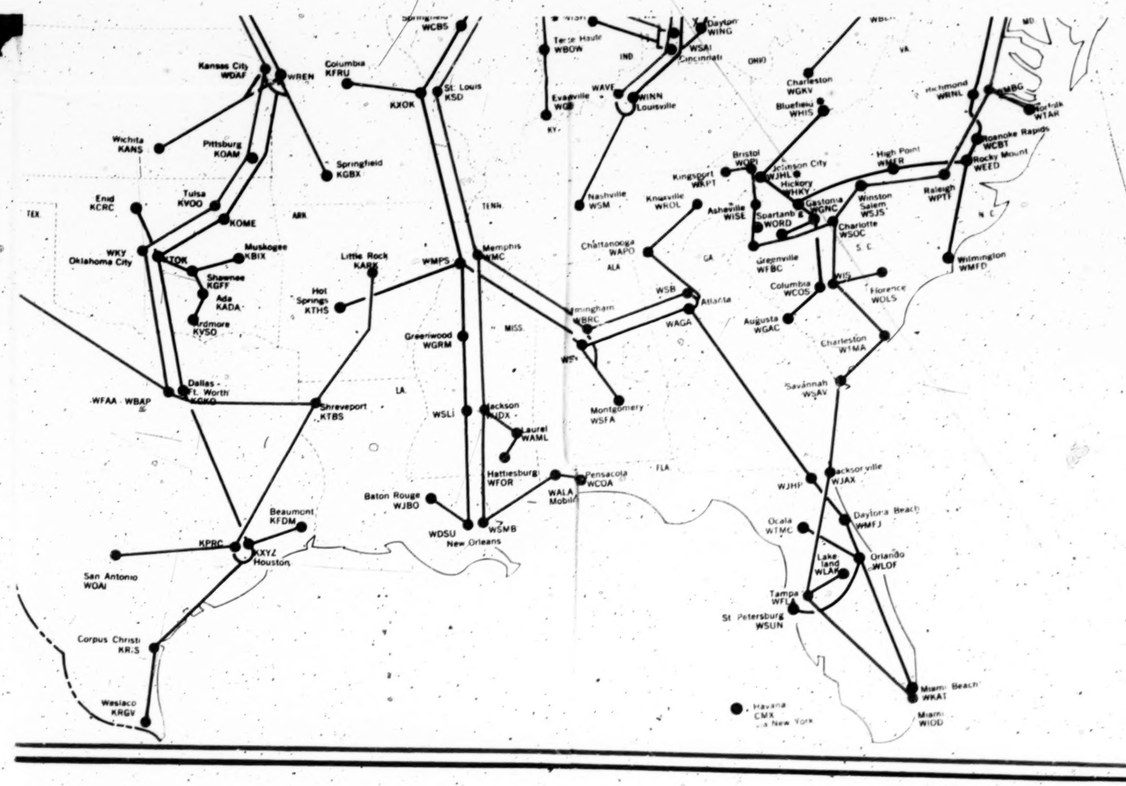
HE NATIONAL BROADCASTING COMPANY, INC.

MARCH 1, 1941

Corrected to June 1, 1941







LEGEND

RED NETWORK

BLUE NETWORK

SUPPLEMENTARY GROUPS

● Affiliated between March 1 and June 1, 1941

X Affiliation changed since March 1, 1941

● To become affiliated after June 1, 1941

jure NBC's business as a corporation engaged in radio broadcasting and in radio network broadcasting and will disrupt and injure Woodmen's and Stromberg Carlson's businesses as corporations engaged, respectively, in radio broadcasting and in radio network broadcasting, all to the great damage of NBC, Woodmen and Stromberg Carlson.

41. Plaintiffs allege that each and every numbered paragraph of the Order is void and beyond the power and authority of the Commission to impose, for each of the following reasons:

(a) The Commission entered the Order upon the basis of considerations and standards not fixed or prescribed by the Communications Act of 1934 and upon which the Commission has no power or authority to pass.

(b) The Commission is without authority under Sections 4(i), 303(f), 303(i) or 303(r) of the Communications Act of 1934 or under any other Section of said Act, to prescribe the terms of contracts, arrangements or understandings between operators of standard broadcast stations, including Woodmen and Stromberg Carlson, and NBC; or to prohibit ownership by a network organization of more than one station in any given locality or the ownership by a network organization of one of a few stations or the most desirable station in a given locality; or to deprive a standard broadcast station of the right to be affiliated with a network organization which maintains more than one network.

(c) By entering the Order, the Commission attempted to fix and prescribe rules governing the licensing of standard broadcast stations, including Stations WOW and WHAM and the stations owned and operated by NBC, different from and at variance with the rule prescribed by Section 307(a) of the Communications Act of 1934 and not otherwise authorized by any law of the United States.

(d) By entering the Order, the Commission attempted to fix and prescribe rules governing the licensing of such standard broadcast stations different from and at variance with the rule prescribed by Section 309(a) of the Communications Act of 1934 and not otherwise authorized by any law of the United States.

[fol. 15] 42. Sections 307(a) and 309(a) of said Communications Act of 1934 provide, in substance, that the Commis-

sion shall grant a station license provided for by said Act if public convenience, interest or necessity will be served thereby. The Commission is not authorized by said Act, nor by any law of the United States, to grant or deny such station license upon any other standard.

43. Plaintiffs allege that each and every numbered paragraph contained in the Order is void and beyond the power and authority of the Commission to impose for the reason that said paragraphs of the Order specify, in substance, that station licenses provided for by said Act shall be denied to any standard broadcast station and to any network organization described therein solely upon the ground that said station has an affiliation contract with a network organization containing any one or more of the provisions described in said paragraphs (as stated in paragraphs 28 through 35 of this Compalint), or that said network organization owns certain facilities described in paragraphs 3.106 and 3.107 of the Order (as stated in paragraphs 37 and 39 of this Complaint), without regard to whether the public interest, convenience or necessity will be served by the granting of each such license.

44. Plaintiffs further allege that each and every numbered paragraph of the Order is void and beyond the power and authority of the Commission to impose for the reason that the Order is arbitrary and capricious and contrary to the public interest.

45. Plaintiffs further allege that if Section 4(i), 303(f), 303(i) or 303(r) of the Communications Act of 1934 are to be construed, separately or collectively, as authorizing or empowering the Commission to issue the Order, then said provisions, and each of them, are unconstitutional and void. in that they constitute a delegation of legislative power to the Commission in violation of Article I, Section 1, and Article I, Section 8, paragraph 18 of the Constitution of the United States.

46. Plaintiffs further allege that the order, if authorized by any provision of the Communications Act of 1934, deprives each of them of its property without due process of law contrary to the Fifth Amendment of the Constitution of the United States.

[fol. 16] 47. The Commission is threatening to enforce the Order, in so far as the Order purports to become effective

on or before November 15, 1941, by proceeding for the revocation of station licenses and otherwise, and if Plaintiffs do not comply therewith, each of them will suffer irreparable damage and injury and will also be subjected to loss of its broadcasting license or licenses.

48. Plaintiffs further allege that the Order already has had, and will continue to have, the effect of working irreparable damage and injury upon each of them in the conduct of its business; that because of the provisions of the Order, NBC is unable to negotiate or enter into contracts containing provisions necessary to its network operations or renewals of such contracts with operators of standard broadcast stations, including Woodmen and Stromberg Carlson, which would otherwise enter into or renew such contracts of affiliation with NBC's network organization; that because of the Order, standard broadcast stations now affiliated with NBC under contracts entered into prior to May 2, 1941, are desirous of abrogating said contracts, not less than 48 such stations having served notice of such abrogation; that as a result of the Order, the value of the standard broadcast stations and network organizations now owned and operated by NBC and the value of the standard broadcast stations owned by Woodmen and Stromberg Carlson have diminished, and will continue to diminish; that as a result of the Order, certain advertisers have refused to renew existing contracts and have refused to enter into new contracts for the use of NBC's network facilities; and that the necessary effect of the Order upon the businesses of NBC, Woodmen and Stromberg Carlson as persons engaged, respectively, in radio network broadcasting has been, and will continue to be, such as to render impossible the proper and efficient conduct of such business.

49. NBC, Woodmen and Stromberg Carlson, respectively, have no adequate remedy at law and no method of proceeding exists for the review of the Order except by this action.

Wherefore, plaintiffs pray:

1. That a summons issue under the seal of this Honorable Court and a copy of said summons and of this Complaint be served upon the United States and the Federal [fol. 17] Communications Commission as prescribed by Rule 4(d) (4) and 4(d) (5) of the Federal Rules of Civil Procedure.

2. That this Court, as soon as practicable, convene a specially constituted court of three judges as required by Title 28, Section 47, of the Code of Laws of the United States, and that a temporary or interlocutory injunction be entered herein restraining, enjoining and suspending until the further order of this Court, the operation, execution, and enforcement of the Order, in so far as the Order purports to become effective on or before November 15, 1941.

3. That pending a hearing upon the aforesaid application for a temporary or interlocutory injunction, a preliminary restraining order be issued in terms restraining, enjoining and suspending the operation, execution and enforcement of the Order, in so far as the Order purports to become effective on or before November 15, 1941, until said application for a temporary or interlocutory injunction shall have been heard and determined and for a period of ninety days thereafter.

4. That after final hearing, this Court adjudge, order and decree that the Order, in so far as the Order purports to become effective on or before November 15, 1941, is, and has at all times been, beyond the lawful authority of the Commission, in violation of the legal rights of Plaintiffs, wholly void, and arbitrary and unreasonable and that the Order, in so far as the Order purports to become effective on or before November 15, 1941, be perpetually vacated, set aside, suspended and annulled and the enforcement thereof perpetually restrained and enjoined.

5. That Plaintiffs may have such other and further relief in the premises as to equity and justice may appertain and as may be deemed by this Court to be adequate and proper under the circumstances.

Wright, Gordon, Zachry, Parlin & Cahill, by John T. Cahill, a member of the firm, Attorneys for National Broadcasting Company, Inc., Office and Post Office Address, 63 Wall Street, Borough of Manhattan, City, County and State of New York. [fol. 18] Thomson, Wood and Hoffman, by John B. Dawson, a member of the firm, Attorneys for Woodmen of the World Life Insurance Society, Office and Post Office Address, 48 Wall Street,

Borough of Manhattan, City, County and State of New York. Hill, Rivkins and Middleton, by Thomas H. Middleton, a member of the firm, Attorneys for Stromberg Carlson Telephone Manufacturing Company, Office and Post Office Address, 60 Wall Street, Borough of Manhattan, City, County and State of New York. Goodwin, Nixon, Hargrave, Middleton & Devans, Office and P. O. Address, 31 Exchange St., Rochester, N. Y., Of Counsel for Stromberg Carlson Telephone Manufacturing Company.

Duly sworn to by Niles Trammell et al. Jurats omitted in printing.

EXHIBIT "A" TO COMPLAINT

National Broadcasting Company, Inc.

New York, N. Y., ——, 194—.

——— ———.

——— ———.

Radio Station ——.

GENTLEMEN:

We are proposing in this letter the following plan of network cooperation between this Company and your Station——.

I. Network Affiliation and Program Service

(1) In order that your station may continue to serve the public interest, convenience and necessity by broadcasting programs of a quality and character generally beyond the reach of individual stations, NBC will, at its own expense, extend its program transmission lines to your control board at your main studios and offer your station network programs of wide variety, including musical, educational, religious, sports, public affairs, international and [fol. 19] special events programs. We will offer to furnish

your station a minimum of 200 unit hours * of our network sustaining and commercial programs combined during each 28-day period, or if we fail to do so we will pay you at the hourly rate of compensation set forth in Section II, Paragraph (1) sub-division (a) of this letter for network commercial programs for any time necessary to make up the difference between the service actually offered to your station and the minimum mentioned above. The network sustaining programs which we offer to furnish are for sustaining use only and may not be sold by your station for commercial sponsorship or used for any other purpose.

(2) In return for the NBC network affiliation, including sustaining program service, you will waive compensation for 16 unit hours of our network commercial programs broadcast by your station during each 28-day period.

H. Station Compensation

(1) Beginning with the effective date of this agreement, we will pay you for each succeeding 28-day period, approximately 15 days after the close of such period, in accordance with the following provisions:

Your compensation for broadcasting our network commercial programs under this arrangement will be based upon an average unit hour rate computed for each 28-day [fol. 20] period by dividing the total value at the network rate for your station of the network commercial programs

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* Unit hours are computed according to the following table:

Local Time	1 Hour Unit Hour Credit	¾ Hour Unit Hour Credit	½ Hour Unit Hour Credit	¼ Hour Unit Hour Credit
Weekdays:				
12:00 Mid. to 8:00 A. M.	.333	.250	.167	.083
8:00 A. M. to 6:00 P. M.	.500	.375	.250	.125
6:00 P. M. to 11:00 P. M.	1.000	.750	.500	.250
11:00 P. M. to 12:00 Mid.	.500	.375	.250	.125
Sundays:				
12:00 Mid. to 8:00 A. M.	.333	.250	.167	.083
8:00 A. M. to 12:00 Noon	.500	.375	.250	.125
12:00 Noon to 6:00 P. M.	.750	.563	.375	.188
6:00 P. M. to 11:00 P. M.	1.000	.750	.500	.250
11:00 P. M. to 12:00 Mid.	.500	.375	.250	.125

broadcast from your station, by the total number of unit hours of such programs during that period.

(a) For the first 25 unit hours in excess of the 16 unit hours covering the network affiliation, NBC will pay you at the rate of 20% of your average unit hour rate for the 28-day period.

(b) For the next 25 unit hours, NBC will pay you at the rate of 30% of your average unit hour rate for the 28-day period.

(c) For all unit hours in excess of 66 unit hours, NBC will pay you at the rate of 37½% of your average unit hour rate for the 28-day period.

(2) The network station rate for your station, on which its compensation will be figured as provided above, will be $—— per full evening hour. This rate will apply between 6:00 P. M. and 11:00 P. M. local time at your station. Rates for other hours and for shorter periods will be as follows:

Local Time at Station	1 Hour Network Station Rate	¾ Hour Network Station Rate	½ Hour Network Station Rate	¼ Hour Network Station Rate
Daily Except Sunday:				
12:00 Mid. to 8:00 A. M.—				
8:00 A. M. to 6:00 P. M.—				
6:00 P. M. to 11:00 P. M.—				
11:00 P. M. to 12:00 Mid.—				
Sunday:				
12:00 Mid. to 8:00 A. M.—				
8:00 A. M. to 12:00 Noon—				
12:00 Noon to 6:00 P. M.—				
6:00 P. M. to 11:00 P. M.—				
11:00 P. M. to 12:00 Mid.—				

Rates for periods longer than one hour will be in exact proportion to the corresponding one-hour rate. Commissions to agencies and discounts and rebates to advertisers will not be applied to the foregoing rates in computing the average unit hour rate for your station. It is our policy, [fol. 21] however, to allow advertisers using a block of time,

even though it be broken into half-hour and/or quarter-hour contiguous periods for the purpose of advertising separate products, the benefit of the rate applicable to the entire block of time, in which event the rate for your station for such entire block of time will be used in computing the compensation due your station.

(3) NBC reserves the right to change at any time your network station rate to advertisers from that set forth in the preceding table. In the event of such a change, the station compensation due you will be adjusted as follows:

(a) If NBC increases your network station rate to advertisers above that set forth in the preceding table, such increased rate shall be used in computing the station compensation due you on business actually sold by NBC at such increased rate.

(b) Except as provided in subsection (c) of this paragraph, if NBC decreases your network station rate to advertisers below that set forth in the preceding table, such decreased rate shall be used in computing the station compensation due you, provided NBC has given you one year's written notice of its intention to so decrease your station compensation. In the event of such decrease in your station compensation, you may terminate this agreement as of the effective date of such station compensation decrease by giving NBC written notification within ninety days after the receipt of our notice to you to so reduce your compensation.

(c) If NBC decreases your network station rate to advertisers below that set forth in the preceding table and at the same time decreases the network station rate to advertisers of a majority of all NBC network stations, such decreased rate shall be used in computing the station compensation due you, provided NBC has given you ninety days' written notice of its intention to so decrease your station compensation. In the event of such decrease in your station compensation, you may terminate this agreement as of the effective date of such station compensation decrease by giving NBC written notification within thirty days after the receipt of our notice to you to so reduce your compensation.

[fol. 22] III. Network Optional Time

(1) Upon 28 days' notice, your station will broadcast network commercial programs for NBC during any periods requested by NBC within the hours designated below as Network Optional Time, provided, that because of your public responsibility your station may reject a network program the broadcasting of which would not be in the public interest, convenience and necessity.

Network Optional Time will be as follows:

(New York City Time)

Weekdays	Sundays
10:00 A. M. to 12:00 Noon	1:00 P. M. to 4:00 P. M.
3:00 P. M. to 6:00 P. M.	5:00 P. M. to 6:00 P. M.
7:00 P. M. to 7:30 P. M.	7:00 P. M. to 11:00 P. M.
8:00 P. M. to 11:00 P. M.	

(2) We will give you at least 28 days' advance notice of the discontinuance of any scheduled series of network commercial programs, failing which we will pay you the compensation you would have received if the series had continued for 28 days following the receipt by you of notice of discontinuance, except that you will not be entitled to compensation for any discontinued program for which we substitute another network commercial program. Nothing in this paragraph shall entitle you to compensation as a result of our changing a network program, without 28 days' advance notice, to a time in network optional time for which your station is not already committed to carry a commercial broadcast.

(3) Because of the public responsibility of the network and its Associated Stations, NBC may at any time substitute for any scheduled network program a network program which involves a special event of public importance. No compensation will be paid for the cancelled program or for the substituted program unless the substituted program is commercially sponsored, when the regular compensation will be paid for it.

IV. Announcement Services

(1) You agree to supply upon order from us the services of such personnel and the use of such equipment as

[fol. 23] may be necessary to broadcast, either from your station alone or from your station and to a network of stations, any announcements we may request on any network commercial program broadcast from your station, provided such order is received by you not less that 48 hours in advance of the program on which the announcement is to be made.

(2) Either simultaneously with the placing of such order by us or as soon thereafter as possible, we agree to supply you with the text of such announcements, or a recording of such announcements, together with the necessary instructions as to the time and place in our network program during which we desire such announcements to be made (either by your announcer or by means of the recording) and you agreed to make such announcements in accordance with our instructions. It is understood, of course, you may refuse to broadcast any announcements the broadcasting of which would not be in the public interest, convenience and necessity.

(3) We may cancel any such order for announcements without liability on our part provided we do so upon not less than 48 hours' notice to you, failing which we will pay you the compensation you would have received if the announcements had continued as scheduled for 48 hours following receipt by you of such notice of cancellation.

(4) During a network commercial program which you have agreed to broadcast you agree not to broadcast without our consent any commercial announcements from your station.

(5) As compensation for these announcement services we agree to pay you on approximately the fifteenth day of each calendar month, for each program broadcast by you during the immediately preceding calender month on which such announcement services are rendered by you at our request, 7½% of your hourly network station rate, applicable to the hour at your station during which such program was scheduled to start.

V. General.

(1) You will submit to NBC daily reports, upon forms provided by us, of all network programs broadcast by your

[fol. 24] station and of all announcements broadcast by you under the provisions of Section IV hereof.

(2) You agree to maintain for your station such licenses, including performing right licenses, as now are, or hereafter may be, necessary for your station to broadcast the programs which we furnish to you hereunder.

(3) Neither you nor ourselves shall incur any liability hereunder because of our failure to deliver or your failure to broadcast any or all programs due to (a) failure of facilities, (b) labor disputes, or (c) causes beyond the control of the party so failing to deliver or to broadcast.

(4) In the event that the transmitter location, power, frequency or hours or manner of operation of your station are changed at any time so that your station is less valuable to NBC as a network outlet than it is at the time this offer is accepted by you, NBC will have the right to discontinue this arrangement upon thirty days' written notice to you.

(5) You agree to keep the operation of the broadcasting equipment of your station entirely under your control for the period during which you are licensed to operate your station. You agree not to assign your station license unless such assignment is expressly made subject to this agreement.

(6) You agree not to authorize, cause, permit, or enable anything to be done whereby any program which we supply to you hereunder may be used for any purpose other than broadcasting by your station.

(7) You agree not to authorize, cause, permit, or enable anything to be done without our consent whereby a recording is made, or a recording is broadcast, of a program which has been, or is being, broadcast on NBC networks.

8) No waiver by either of us of any breach of any provision of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other provision.

(9) This agreement shall be construed in accordance with the laws of the State of New York

(10) Any arrangement with your station relates only to NBC and your station is not related to any arrangement

[fol. 25] that exist or may later be made between NBC and any other station.

(11) This agreement shall become effective at 3:00 A. M., EST, on the — day of ——, 194—, and it shall continue for —— years thereafter.

If, after examination, you find that the arrangement here proposed is satisfactory to you, please indicate your acceptance on the copy of this letter enclosed for that purpose and return that copy to us.

Very sincerely yours, National Broadcasting Company, Inc., By——. Accepted this — day of ——, 194—. By——.

[fol. 202] Claim Broadcasting Regulations. During July and August, following these hearings, representatives of NBC, CBS, and Mutual held a series of conferences with the Chairman of the Commission, its General Counsel and members of his staff, and, in the later stages, with Commissioner Walker. Representatives of some of the regional networks and some of the affiliates also conferred with members of the Commission and its staff during this period.[3] These conferences were devoted to a discussion of the Chain Broadcasting Regulations, with particular emphasis upon the provisions dealing with network option time. On July 22, 1941, during the course of these conferences, the Commission, on petition of NBC and CBS, postponed the effective date of its Order of May 2, 1941, as to existing affiliation contracts, network organization station licenses, or the maintenance of more than one network by a single network organization, from July 30 until September 16, 1941.

At the termination of these conferences, the Mutual Broadcasting System on August 14, 1941, filed with the Commission a petition requesting it to amend its regulations dealing with network option time and the duration of affiliation contracts. The Mutual petition requested that the Commission permit affiliation contracts up to two years in duration and allow stations to option exclusively to one network the particular periods of time utilized by the network for network commercial programs during the preceding year and to option additional time to one or more networks on a non-exclusive basis; in either case the station to reserve several hours per day free from any network option. On August 28, 1941, Mutual's petition was set for argument before the Commission *en banc* on September 12, 1941 and the Commission announced that at that time it would also hear any other network organizations or licensees who desired to be heard with respect to the Chain Broadcasting Regulations as promulgated, the Mutual petition, or any other modification of any of the Chain Broadcasting Regulations which those appearing desired to propose. The Commission further announced that the Chain Broadcasting Regulations would not be placed in

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[3] *Cf.* Report of the Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong. 1st Sess. (1941), pages 35-42.

(Here follows 1 photolithograph, side folio 26)

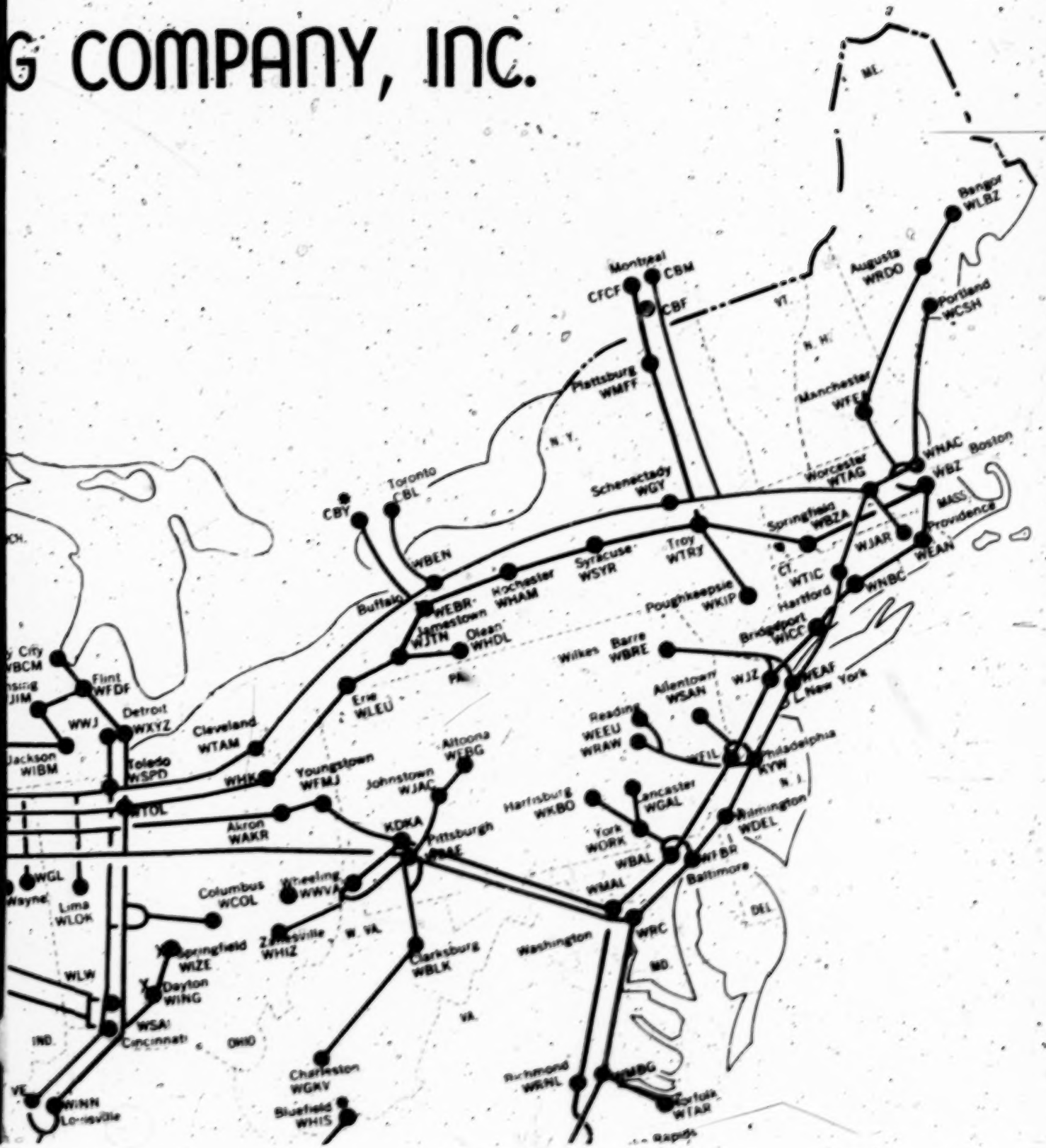
[fol. 203] effect with respect to existing affiliation contracts, or network organization station licensees, or the maintenance of more than one network by a single network organization, until after the disposition of the Mutual petition and of any other which might be filed. Oral arguments on the Mutual petition were heard before the Commission *en banc* on September 12, 1941. Oral arguments were presented on behalf of the Mutual Broadcasting System, the National Broadcasting Company, the Columbia Broadcasting System, and the Colonial and Yankee Networks, and briefs were filed on behalf of the three nation-wide network organizations.

After a careful study of the testimony presented before the Senate Committee on Interstate Commerce, of the considerations presented at the conferences which followed the hearings, and of the oral arguments presented at the hearing on Mutual's petition and of the briefs filed at that time, and after a thorough reconsideration of the entire subject, the Commission has decided to amend three of the Chain Broadcasting Regulations to read as follows:

Regulation 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Regulation 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

G COMPANY, INC.



[fol. 27] EXHIBIT "C" TO COMPLAINT

Order No. 37

Whereas under the provisions of section 303 of the Communications Act of 1934, as amended, "the Commission, from time to time, as public convenience, interest, or necessity requires, shall—(1) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and

Whereas the Commission has not at this time sufficient information in fact upon which to base regulations regarding contractual relations between chain companies and network stations, multiple ownership of radio broadcast stations of various classes, competitive practices of all classes of stations, networks, and chain companies, and other methods by which competition may be restrained or by which restricted use of facilities may result; Now therefore,

It Is Ordered, That the Federal Communications Commission undertake an immediate investigation to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity; such investigation to include an inquiry into the following specific matters, as well as all other pertinent and related matters, including those covered in the report on social and economic data prepared by the Engineering Department of the Federal Communications Commission and filed with the Commission on January 20, 1938:

1. The contractual rights and obligations of stations engaged in chain broadcasting, arising out of their network agreements.

2. The extent of the control of programs, advertising contracts, and other matters exercised in practice by stations engaged in chain broadcasting.

3. The nature and extent of network program duplication by stations serving the same area.

4. Contract provisions in network agreements providing for exclusive affiliation with a single network and also provisions restricting networks from affiliation with other stations in a given area.

5. The extent to which single chains or networks have exclusive coverage in any service area.

[fol. 28] 6. Program policies adopted by the various national and other networks and chains, with respect to character of programs, diversification, and accommodation of program characteristics to the requirements of the area to be served.

7. The number and location of stations licensed to or affiliated with each of the various national and other networks. The number of hours and the specified time which such networks control over the station affiliates and the number of hours and the specified time actually used by such networks.

8. The rights and obligations of stations engaged in chain broadcasting so far as advertisers having network contracts are concerned.

9. Nature of service rendered by each station licensed to a chain or network organization, particularly with respect to amount of program origination for network purposes by such stations.

10. Competitive practices of stations engaged in chain broadcasting as compared with such practices in the broadcasting industry generally.

11. Effect of chain broadcasting upon stations not affiliated with or licensed to any chain or network organization.

12. Practices or agreements in restraint of trade or furtherance of monopoly in connection with chain broadcasting.

13. Extent and effects of concentration of control of stations locally, regionally, or nationally in the same or affiliated interests, by means of chain or network contracts or agreements, management contracts or agreements, common ownership or other means or devices, particularly insofar as the same tends toward or results in restraint of trade or monopoly.

It Is Further Ordered, That hearings be held in connection with such investigation at such times and places as the Commission shall designate.

It Is Further Ordered, That a copy of this order be posted in the office of the Secretary and that a copy of the same be mailed to each licensee of a broadcast station and to each chain and network organization.

By the Commission.

T. J. Slowie, Secretary.

[pages 29 to 200]

EXHIBIT "D" TO COMPLAINT

[Omitted]

[fol. 201] EXHIBIT "E" TO COMPLAINT

Supplemental Report on Chain Broadcasting

(October 11, 1941)

By the Commission

(Chairman Fly, Commissioners Walker, Payne and Wakefield; Commissioners Case and Craven dissenting)

On May 2, 1941, the Commission promulgated its Report on Chain Broadcasting accompanied by eight regulations setting forth a statement of the policy to be followed by the Commission in licensing stations owned by or affiliated with network organizations. The concluding paragraph of the order promulgating the regulations dealt with their effective date, which, with respect to existing affiliation contracts and station licenses, was set at 90 days from the date of the order.[1] On June 13, 1941 the Commission amended the concluding paragraph of the order to clarify its intent that the 90-day deferment period mentioned in that paragraph should apply to the disposal of one NBC network as well as to the disposition of individual stations by networks, and further that the effective date of compliance in either case might be extended from time to time in order to permit the orderly disposition of properties.

Extensive hearings before the Senate Committee on Interstate Commerce were held during June, 1941 on the White Resolution[2] which called for a study of the Commission's

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[1] *Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060, May, 1941.

[2] Senate Resolution No. 113, 77th Congress, 1st Session. The Resolution, introduced by Senator White, provided for an investigation of the probable effect of the regulations upon the broadcasting industry and of the authority of the Commission to promulgate and enforce them, and also requested the Commission to postpone the regulations until 60 days after the Senate Interstate Commerce Committee reported to the Senate. The hearings before the Committee were adjourned on June 20, 1941, subject to the call of the Chairman.

[fol. 204] Regulation 3.104. No license shall be granted to a standard broadcast station which options [1] for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours [2] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.[3] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

Territorial Exclusivity

At the hearings on the White Resolution it was argued on behalf of NBC and Columbia that Regulation 3.102 would permit the largest and most powerful stations in each city to take most of the desirable network business away from the smaller and less powerful stations, and that the elimination of territorial exclusivity would prevent a regular affiliation between a network organization and a station. [fol. 205] In order to clarify the meaning of Regulation

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[1] As used in this regulation, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

[2] All time options permitted under this regulation must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified option hours correspondingly as agreed by the station and network organization.

[3] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

3.102 the Commission has determined to add the following sentence to that regulation:

"This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."

This sentence does not change the meaning[1] of Regulation 3.102 but is intended to eliminate confusion with respect to its interpretation. Regulation 3.102 is not intended to and does not prohibit a regular affiliation contract whereby a network agrees to make a first offer of all its programs to one particular station in a given community. The Commission believes, however, that in the case of non-commercial public service programs of outstanding national or international significance, such first offer should not constitute an exclusive offer and that the network should be left free to furnish such programs to other stations in the same area.

Duration of Affiliation Contracts

Under present rules the license of a standard broadcast station is limited to one year. The broadcast industry has reached a point of maturity where it appears advisable to increase the license period of standard broadcast stations to two years. The Commission believes that this action will bring an increased measure of stability to the broadcast industry without any detrimental results. By separate action taken this day we are amending Sections 3.34 and 4.3 of our rules to accomplish this result.

In connection with the extension of the license period for all standard broadcast stations from one year to two years, the Commission has determined to license stations [fol. 206] which have entered into affiliation contracts whose term is not longer than two years. In its report, the Com-

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[1] In its public notice No. 51314 dated June 19, 1941, the Commission informally approved the new Mutual network form of contract which contained a provision giving the station the first call on Mutual network commercial and sustaining programs in the city in which the station is located.

mission found that the five-year affiliation contracts entered into by NBC and CBS were intended to prevent any real competition in the network station market, and that such long term contracts were a substantial factor in suppressing such competition. The Commission found that as a result the public lost the benefits of competition between stations for affiliation with the existing networks, and was also deprived of the advantages that might flow from the establishment and development of new networks. In its report of May 2, 1941, the Commission found that no business need was shown for an affiliation contract longer than one year. The Commission also found that competition would be fostered if opportunity were provided for annual readjustments on the basis of comparative showings of networks and stations.

After a consideration of the arguments presented on Mutual's petition and a reconsideration of the entire subject of the duration of affiliation contracts, the Commission concludes that a two-year affiliation contract will permit a reasonable measure of stability in network-station relationships without at the same time seriously interfering with competition in the network-station market. Of course, what precise limit on the duration of affiliation contracts is most desirable is a matter of judgment. A two-year affiliation contract represents a substantial diminution from the five-year term currently being utilized by NBC and CBS, and may be expected to remove that restraint upon competition and give freer play to competitive factors by making possible readjustments between stations and networks on a biennial basis.

Network Option Time

The option-time regulation promulgated by the Commission on May 2, 1941 (Regulation 3.104), prohibited all optioning of time by stations for network programs. That regulation was based upon the finding of the Commission that the optioning of time by licensee stations restricted their freedom, interfered with their ability to serve local program needs, hampered their efforts to broadcast local programs, national spot, and other non-network programs, and restricted competition in network programs.

[fol. 207] Notwithstanding these serious restraints imposed upon station licensees by network options, NBC and

'BS utilize only a fraction of the valuable broadcast hours which they place under option. The NBC option for most of its affiliates covers 8 or 8½ specified hours per day, while the CBS option covers the entire broadcast day. Upon 28 days' notice, NBC and CBS may call upon their outlets to carry network commercial programs during the optioned time and to move whatever other programs they may have scheduled during those periods. In 1938 NBC used for network commercial programs only 58.1 per cent of the optioned time of stations on the basic Red network and only 19.4 per cent on the basic Blue network and CBS used only 39 per cent of the optioned time of its basic stations. The Commission found that this great disparity between option and use was an abuse which seriously interfered with the non-network program service of station licensees and restricted the broadcasting of programs of other networks.

The Commission is not convinced by the contention of NBC and CBS that the optioning of time by networks is indispensable to network operations, particularly since the chain broadcasting regulations, neither in their original form nor as herein amended, place any restrictions on the bona fide purchase of station time by networks. Networks have heretofore successfully operated without option time. However, it is clear that some optioning of time by networks in order to clear the same period of time over a number of stations for network programs will operate as a business convenience. Within certain limits, it should be possible for stations to option time for network programs without interfering too seriously with their local program requirements, with their local and national spot business, and without restricting the access of competing networks to those stations. The Commission believes that the option-time regulation as herein amended accomplishes that result.

Under the amended regulation the broadcast day is divided into four segments: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; and 11 p. m. to 8 a. m. A station is permitted to option up to three hours during each segment to one or more network organizations on a non-exclusive basis. The regulation provides that the hours covered by option must be specified hours; for, if a roving option [fol. 208] were permitted, the station would be effectively prevented from scheduling any non-network programs during any of the hours on which such roving option might

conceivably settle. Stations are prevented by the regulation from optioning any time to networks subject to call on less than 56 days' notice. The call period currently being utilized is 28 days. This lengthening of the call period will give stations greater freedom in scheduling local and non-network national programs during the hours of the broadcast day which are subject to network option; for such programs, even though subject to be moved, may be assured of at least eight weeks of continuous broadcasting. Nor does it seem that the increase in the call period will seriously affect national network business; for the national networks have pointed out that theirs is a long-range business and that large-scale national advertising network programs are usually planned and arranged for many months and even a year or two ahead of the actual commencement of the broadcasts. Under such circumstances, it does not appear that a 56-day call period will impose any serious hardship upon national network operations.

One of the results of the amended option-time regulation will be that during at least two specific hours within each of the important three segments of the broadcast day—morning, afternoon, and evening, a station may not option time for network programs, so that non-network programs may be scheduled during these hours without fear of removal as a result of network options. During the night segment, from 11 p. m. to 8 a. m., a station may option up to three hours for network programs. For the most part, programs broadcast within those hours have been local programs; but some networks, Colonial, for example, have originated programs during the early morning or late evening hours which have been broadcast by their outlets with apparent wide listener acceptance.

The amended option-time regulation does not require any station to option any time to any network; it simply sets the maximum amount of time which a station may place under option for network programs. Stations and networks are free to negotiate which specific hours are to be placed under option and how many hours, within the limits specified in the regulation, are to be placed under option. A network, by virtue of whatever option it is successful in negotiating, to that extent secures the right-of-way [fol. 209] over local and national non-network programs during the time under option. But during at least two speci-

fied hours within each of the three more important segments of the broadcast day and during at least six hours of the night segment a station may not option time for network programs. Local and non-network national programs being broadcast within such periods may not be subjected to be moved as a matter of contract in order to accommodate network programs, and the networks may utilize such hours only by the outright purchase of time.

It has been the consistent intention of the Commission to assure that an adequate amount of time during the good listening hours shall be made available to meet the needs of the community in terms of public expression and of local interest. If these regulations do not accomplish this objective, the subject will be given further consideration.

By providing that the options for network programs must be on a non-exclusive basis, the amended option-time regulation prevents the option-time device from being utilized to restrain competition offered by other networks. While a station is not compelled to option the same hours to more than one network, it may not enter into any arrangement with one network organization which prevents it from optioning or selling the same or other time to other network organizations. This is an all-important consideration in the many cities which contain only three full-time stations to which all four national networks seek access. Where a station options the same period of time to several networks, the mere existence of the option will not preclude network competition; for that period of time will be available for sale by all the networks holding the option. The first network which is successful in selling any particular period under option will, of course, reap the benefit of the option as long as the time remains sold. Although they have used only a fraction of the optioned time of their outlets, CBS and NBC have been able to prevent a competing network from using the unused time of their affiliates simply because those periods are under option to them. Under the amended option-time regulation, NBC and CBS will be able to exclude other networks only in the event and to the extent that they actually utilize the time under option.

The non-exclusive option should be instrumental in fostering competition between networks and at the same time should make it possible for a network organization to clear [fol. 210] time over a number of stations for a network

program. Without any optioning of time, the greatest obstacle in the way of clearing the same period of time over a number of stations for a network program would be the fact that many of the stations might have scheduled local and non-network national programs during various periods of the broadcast day. During whatever period of time is included within the non-exclusive option, local and non-network national programs will be subject to be moved on 56 days' notice. A station must remain free, however, to sell or option time, included within the non-exclusive option period but not actually being utilized for a network commercial program, to one or more other network organizations.

After weighing the considerations in support of the non-exclusive option against those advanced in opposition, the Commission has come to the conclusion that the non-exclusive option appears to be a particularly appropriate solution of the problem of clearing time for network programs and at the same time of fostering competition in the network-station market.

The Commission has rejected the proposal, suggested but not unqualifiedly recommended in the Mutual petition, to permit a station to option exclusively to one network the particular periods of time utilized by that network for network commercial programs over the station during the preceding year. An exclusive option effectively removes a station from the station-network market with respect to all the time it covers. The Commission believes that such a serious restraint upon competition is inconsistent with the freely competitive system contemplated by Congress in the Communications Act of 1934. An exclusive option, to the extent that it encompasses the most valuable broadcast hours, approaches the effectiveness of the exclusivity clauses in affiliation contracts in denying other networks access to a station, and is therefore objectionable for many of the reasons given in the Report for the elimination of exclusive affiliation. Nor is the fact that a given network has utilized a particular period of time over a station any real justification for placing that time under exclusive option. The network which has a contract for a commercial program with a sponsor and which has been sending that program to a number of its affiliated stations throughout a season already has an almost insuperable advantage in

selling that program for another year; for commercial pro-
[fol. 211] gram series are frequently renewed year after year. To permit such a network to have an exclusive option over its affiliated stations on the periods used for commercial network programs would effectively destroy the possibility of competition for those periods.

Multiple Network Operation by NBC

The Commission has determined to suspend indefinitely Regulation 3.107, which provides that no license shall be granted to a standard broadcast station affiliated with a network organization which maintains more than one network. Separate ownership of what are now the Red and Blue networks of NBC is so generally recognized to be desirable that we believe a separation will soon occur without the spur of a legal mandate. Any policy requiring the sale of substantial properties should be applied with due regard for the preservation of fair values, and the Commission wishes to avoid the semblance of pressure on NBC to effect a forced sale.

In addition to suspending this regulation, the Commission has provided that any subsequent order placing the regulation in effect shall provide for a period of at least six months between the announcement and the effective date, and for further extension of the effective date from time to time if necessary to prevent a forced sale. As amended, the paragraph setting forth the effective date of the Chain Broadcasting regulations reads as follows:

"It is further ordered, That these regulations shall become effective immediately: *Provided,* That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further,* that the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further,* That the effective date of Regulation 3.107 shall be suspended indefinitely, and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

Other considerations have motivated the Commission in this decision. The Commission is desirous of seeing that [fol. 212] the network which is disposed of by NBC is transferred to a responsible new owner as a going organization with its personnel, talent, programs and stations intact as far as possible. NBC's existing affiliation contracts and those that it may negotiate in the future will be an important factor in the continued profitable and efficient operation of its networks. Therefore, pending the development of plans for the disposition of one of the NBC networks as a unit, the Commission has deemed it wise to suspend this regulation.

Conclusion

The Commission adheres to the views expressed in its report on Chain Broadcasting. It is of the opinion that the chain broadcasting regulations will tend to decentralize the tremendous power over what the public may hear which is now lodged in the major network organizations, and will remove existing restraints upon competition without interfering unduly with the operations of the network organizations. The Commission has further concluded, however, that the regulations may be amended as set out above without sacrifice of these objectives, and that the amendments will additionally insure that no aspect of the network broadcasting structure will be unnecessarily or unduly disturbed.

For the reason stated at pages 77 to 79, of its Report, the Commission has determined that its chain broadcasting regulations should be applicable to regional as well as national networks. Special circumstances and considerations may be applicable in the case of regional networks, and the Commission will examine any further representations on their behalf with especial care.

The Commission stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances the chain broadcasting regulations should not be applicable to any particular situation.

[fol. 213] Federal Communications Commission

Washington, D. C.

October 11, 1941.

ORDER

At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 11th day of October, 1941,

The Commission having under consideration the petition of the Mutual Broadcasting System, filed August 14, 1941, requesting that the Commission amend its order entered in Docket No. 5060 promulgating regulations applicable to radio stations engaged in chain broadcasting by modifying the regulations dealing with option time and the duration of affiliation contracts, having heard oral argument on said petition and having reconsidered its report and order in Docket No. 5060,

It is ordered, That the Commission's order of May 2, 1941, entered in Docket No. 5060, be and the same is hereby, amended in the following particulars:

Sections 3.102, 3.103, and 3.104 of the Regulations set forth in said order are hereby amended to read as follows:

Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two [fol. 214] years: *Provided*, That a contract, arrangement,

or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

Section 3.104. No license shall be granted to a standard broadcast station which options [1] for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours [2] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.[3] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

The last paragraph of said order is hereby amended to read as follows:

"It is further ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall [fol. 215] be deferred until November 15, 1941; *Provided*

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[1] As used in this section, an option is any contract, agreement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

[2] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

[3] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

further, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

T. J. Slowie, Secretary.

Dissenting Opinion of Commissioners Norman S. Case and T. A. M. Craven

We disagree with the supplemental report of the Commission on Chain Broadcasting, in Docket 5060, for the same basic reasons previously outlined in our dissenting opinion, filed with the Commission's original report on this matter, dated May, 1941. We remain convinced that the majority of the Commission exceeds the power delegated to the Commission in the Communications Act of 1934. We also are convinced that the aggregate effect of the proposed rules will not result in a broadcasting system more in the public interest than that of today. We fear that the nation's radio service may be seriously impaired at a time when efficient service is most needed. Furthermore, we believe that the effect of the rules is certain to result in deterioration of the present excellent public service programs now rendered to the nation by the radio industry.

The effect of the regulations will be to change radically the business structure of the broadcast industry. The present is no time to force revolutionary reforms upon an industry which has served the public interest of the nation, particularly when such reforms bear no relation whatsoever to the national defense effort. The radio industry has cooperated wholeheartedly with the Government in this national emergency in spite of the fundamental and imminent changes in the national economic structure. These economic changes may cause vast readjustments in all industry as well as by the entire public. The cumulative effect of these basic national economic readjustments upon the radio [fol. 216] industry cannot be determined with accuracy at this time. Therefore, it appears to us that to add to the

instability of the radio industry by enforcing new Government regulations, which in themselves superimpose fundamental economic readjustments, is unwise. There is no evidence in this record which justifies such a sweeping change as is compelled by these new rules promulgated by the majority of this Commission. Any improvements which may seem desirable in the operation of the existing broadcast structure can be obtained in an evolutionary manner by far less harsh measures than those proposed by the majority in the instant case.

We do not condone unreasonable restraints upon competition within the broadcasting industry of this country and, therefore, advocate that if any abuses of this nature exist they should be corrected forthwith either by voluntary action within the industry or else by procedures undertaken by agencies of the Government having legal jurisdiction in the premises. Likewise, we subscribe to the doctrine of reasonable diversification in the control of the radio broadcasting channels. It is for this latter reason that we believe the ultimate separation of one of the two networks now operated by the National Broadcasting Company will be an improvement of benefit to the public.

In this respect, however, we believe that the Government should not force private enterprise to dispose of its property on an unsound business basis when such enterprise has rendered good service to the public, and particularly when, as in this case, the Government itself has previously given its tacit approval and encouragement to the enterprise. Consequently, we welcome the fact that the majority has suspended the effective date of its original regulation (Sec. 3.107) to force the sale of one of the networks now operated by the National Broadcasting Company.

Our present objection is centered on the modified regulation, 3.104. Ostensibly this regulation permits options to be taken by a network on an affiliated station's time. In reality, however, an affiliate must be free to option identical time to all networks regardless of affiliation. Under such conditions it should be obvious that absurd complexities may easily arise in the ordinary conduct of business. It is true that another regulation permits a station to contract with a network for first call on a network's program offerings. If it be reasonable for an affiliate to contract for [fol. 217] first call on a network's programs, it is obviously reasonable for the network to obtain first call on the affiliate

station's tir[illegible]. However, the latter is specifically prohibited by the regulation. Apparently by changing the regulation originally promulgated, the majority intended to recognize the practical business situation in broadcasting. It is our opinion that the new regulation does not accomplish this purpose and that networks in reality secure no substantial option privileges under this regulation. We believe that stations should be permitted to utilize the same option principles as is done in ordinary business.

The time has come to create stability in the radio industry rather than instability. We believe that service to the public would be enhanced by extending the broadcast station license period to the legal limit of three years. Network companies should be permitted to contract for regular affiliates with which they can engage in business in accord with sound business principles. In this connection we believe that an improvement in the existing situation can be obtained if network affiliates are free at all times to exercise final judgment as to whether or not any program offered to them by the network will serve public interest in the community served by the station. We also believe that the affiliates should have equal power with the networks to terminate the affiliates' contract on due notice.

(Signed) Norman S. Case, T. A. M. Craven.

October 11, 1941.

EXHIBIT "F" TO COMPLAINT

Order in Docket No. 5060 as Issued May 2, 1941 and Amended October 11, 1941

3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization [1]

[1] The term "network organization," as used herein, includes national and regional network organizations.

under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.

[fol. 218] 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organ-

ization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the net work organization.

3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

3.104. No license shall be granted to a standard broadcast station which options [1] for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours [2] within each of four segments

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[1] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

[2] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

[fol. 219] of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m.

to 8 a. m.[3] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control[4] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

3.107. No license shall be issued to a standard broadcast station affiliated with a network organization which [fol. 220] maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

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[3] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

[4] The word "control," as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

3.108. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than network's programs.

It Is Further Ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION

SIRS:

Please Take Notice that the undersigned will bring the attached motion for a preliminary injunction and a temporary restraining order on for hearing before this Court in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, the City of New York, on the 7th day of November, 1941 at 10:30 o'clock A. M., or as soon thereafter as a statutory Court composed of three Judges can be convened, pursuant to the Urgent Deficiencies Act, approved October 22, 1913 (38 Stat. 219, 220; Code of Laws [fol. 221] of the United States, Title 28, Section 47) and counsel can be heard.

Wright, Gordon, Zachry, Parlin & Cahill, by John T. Cahill, a Member of the Firm, Attorneys for National Broadcasting Company, Inc., Office and Post

Office Address, 63 Wall Street, Borough of Manhattan, City, County and State of New York. Thomson, Wood and Hoffman, by John B. Dawson, a Member of the firm, Attorneys for Woodmen of the World Life Insurance Society, Office and Post Office Address, 48 Wall Street, Borough of Manhattan, City, County and State of New York. Hill, Rivkins and Middleton, by Thomas H. Middleton, a Member of the Firm, Attorneys for Stromberg Carlson Telephone Manufacturing Company, Office and Post Office Address, 60 Wall Street, Borough of Manhattan, City, County and State of New York.

To: Honorable Francis Biddle, Attorney General of the United States of America, Department of Justice, Washington, D. C.; Federal Communications Commission, Washington, D. C. Honorable Mathias F. Correa, United States Attorney for the Southern District of New York, U. S. Court House, Foley Square, New York, New York.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION AND FOR TEMPORARY RESTRAINING ORDER

Upon the verified Complaint in this action and the annexed affidavits of Niles Trammell, John J. Gillin, Jr., and Edward A. Hanover, Plaintiffs National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg Carlson Telephone Manufacturing Company move the Court:

(1) For a preliminary injunction in the above-entitled cause, temporarily restraining, enjoining and suspending, pending the final hearing and determination of this cause, [fol. 222] the Order of Defendant Federal Communications Commission, adopted and served upon May 2, 1941, as amended by the Order of said Commission adopted and served upon October 11, 1941, in a proceeding before said

Commission, identified as "In the matter of the Investigation of Chain Broadcasting, Federal Communications Commission, Docket No. 5060", in so far as the Order, as amended, purports to become effective on or before November 15, 1941, and also temporarily enjoining, pending such final hearing and determination, Defendants the United States and Federal Communications Commission, their respective agents, servants, employees, representatives, attorneys and all persons in active concert or participation with them, or any of them, from promulgating, publishing or holding out or causing or permitting to be promulgated, published or held out as effective or valid or authorized by law said Order, purporting to become effective as aforesaid; from, under the purported authority of said Order, revoking any license to operate a standard radio broadcast station now held by Plaintiffs, or any of them; and from, under the purported authority of said Order, threatening any standard broadcast station with loss or denial of such a license; and

(2) For a temporary restraining order in said cause, temporarily staying, suspending and enjoining, pending a hearing and determination upon the aforesaid motion for a preliminary injunction and for a period of 90 days thereafter, the operation, execution and enforcement of said Order purporting to become effective as aforesaid by any Defendant or any agent, servant, employee, representative or attorney of any Defendant or any person in active concert or participation with any of them; and

(3) For such other and further relief in the premises as to equity and justice may appertain and as may be deemed by the Court to be adequate and proper under the circumstances.

The grounds in support of this motion are as follows:

1. Unless restrained, Defendants will promulgate, publish and hold out as effective, valid and authorized by law said Order of the Federal Communications Commission, dated May 2, 1941, as amended on October 11, 1941, in proceedings entitled: "In the Matter of the Investigation of Chain Broadcasting, Federal Communications Commis- [fol. 223] sion, Docket No. 5060." The Order as issued May

2, 1941 was effective immediately except with respect to existing contracts, arrangements or understandings or network organization station licenses and, by amendment of June 13, 1941, except with respect to the maintenance of more than one network by a single network organization. The Order as amended on October 11, 1941 was immediately effective except with respect to existing contracts, arrangements or understandings, network organization station licenses and the maintenance of more than one network by a single network organization. Insofar as the Order and the Order as amended were immediately effective, there has been no postponement of effective date. As a result of successive postponements (on July 22, August 28, and October 11, 1941), the effective date of said Order, as amended, has been postponed until November 15, 1941 with respect to contracts, arrangements and understandings existing on May 2, 1941, and network organization station licenses and the effective date of said Order, as amended (hereinafter sometimes called "the Order"), has been suspended indefinitely with respect to the maintenance of more than one network by a single network organization. Unless restrained the Defendants will, under the purported authority of the Order, instruct operators of standard broadcast stations who were not affiliated with Plaintiff National Broadcasting Company, Inc. on May 2, 1941, not to enter into affiliation contracts with said Plaintiff in the usual form under threat of revocation of their licenses or denial of any application for licenses or renewals thereof made by them; Defendants will, under the purported authority of the Order, on or after November 15, 1941, institute proceedings for the revocation of licenses to operate standard radio broadcast stations now held by Plaintiffs and each of them; and Defendants will also thereunder take notice of and consider as operation contrary to the public interest, convenience and necessity, the operation of hundreds of standard broadcast stations, including those owned or operated by Plaintiffs Woodmen of the World Life Insurance Society and Stromberg Carlson Telephone Manufacturing Company, under affiliation contracts having certain provisions described in the Order, as more particularly set forth in the verified Complaint filed herein, and all as more fully set forth in the affidavits of Niles Trammell, John J. Gillin, Jr. and Edward A. Hanover, annexed hereto.

[fol. 224] 2. Immediate and irreparable injury, loss and damage will result to each of the Plaintiffs, and to the prejudice of the public, by reason of said action threatened by Defendants, as described in paragraph 1 hereof and more particularly set forth in the verified Complaint filed herein and the annexed affidavits of Niles Trammell, John J. Gillin, Jr. and Edward A. Hanover.

3. If Defendants take the action threatened by them as aforesaid in paragraph 1 hereof, any judgment which this Court may later render upon final determination of this cause will be ineffective.

4. If a preliminary injunction and a temporary restraining order be granted herein, the injury, if any, to Defendants herein, if final judgment be in their favor, will be inconsiderable and will be adequately indemnified by bond.

5. No previous application has been made to any court for the relief sought herein.

Wright, Gordon, Zachry, Parlin & Cahill, by John T. Cahill, a Member of the Firm, Attorneys for National Broadcasting Company, Inc., Office and Post Office Address, 63 Wall Street, Borough of Manhattan, City, County and State of New York. Thomson, Wood and Hoffman, by John B. Dawson, a Member of the Firm, Attorneys for Woodmen of the World Life Insurance Society, Office and Post Office Address, 48 Wall Street, Borough of Manhattan, City, County and State of New York. Hill, Rivkins and Middleton, by Thomas H. Middleton, a Member of the Firm, Attorneys for Stromberg Carlson Telephone Manufacturing Company, Office and Post Office Address, 60 Wall Street, Borough of Manhattan, City, County and State of New York. Goodwin, Nixon, Hargrave, Middleton & Devans, Office and P. O. Address, 31 Exchange St., Rochester, N. Y., of Counsel for Stromberg Carlson Telephone Manufacturing Company.

[fol. 225] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF NILES TRAMMELL, PRESIDENT OF NATIONAL BROADCASTING COMPANY, INC.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

Niles Trammell, being duly sworn, deposes and says:

I

Introduction

I am the President of National Broadcasting Company, Inc. (hereinafter called "NBC"), one of the plaintiffs herein. I am familiar with the radio broadcasting business in general and with NBC's radio broadcasting and radio network broadcasting business in particular. I have read the verified Complaint herein and I am familiar with the fact therein stated. This affidavit is made in support of Plaintiff's application for a preliminary restraining order suspending the operation, execution and enforcement of the Order described in the Complaint, and in support of the application of the Plaintiffs herein for a temporary or interlocutory injunction.

II

The Order

On May 2, 1941, the Federal Communications Commission (hereinafter called the "Commission") issued its Order in Docket No. 5060 (Exhibit D to the verified Complaint herein and hereinafter sometimes called "the original Order"). Two of the six Commissioners dissented. On October 11, 1941, the Commission (with two Commissioners dissenting) amended its Order in Docket No. 5060, and a copy of such amendment (hereinafter sometimes called "the Order on Rehearing") is Exhibit E to the verified Complaint herein. Said Order as amended (here-
[fol. 226] inafter sometimes called "the Order") is summarized in paragraphs 28 to 40 of the verified Complaint,

and is hereinafter more fully described. The original Order by its terms purported to become effective with respect to then existing contracts, arrangements and understandings, or network organization station licenses, 90 days thereafter, *i. e.*, on July 31, 1941, and purported to become effective in all other respects on May 2, 1941. On June 13, 1941, said Order was amended so as to defer its effective date with respect to the maintenance of more than one network by a single network organization until July 31, 1941. Said Order was further amended on July 22, 1941 so as to postpone its effective date until September 16, 1941 with respect to contracts, arrangements and understandings existing on May 2, 1941, and with respect to network organization station licenses and the maintenance of more than one network by a single network organization. On August 28, 1941, the effective date for the portions of said Order which were to have become effective on September 16, 1941 was changed to an indeterminate time to be fixed by the Commission on or after September 12, 1941. On October 11, 1941, the effective date of such portions of said Order was fixed at November 15, 1941; that portion of said Order dealing with the ownership of more than one network by a single network organization was indefinitely suspended, subject to being made effective upon six months notice; and certain paragraphs of the original Order were amended in substance as set forth in the Complaint filed herewith and hereinafter more fully described. The Order of the Commission, this affidavit will show, has caused serious and irreparable injury to NBC and will continue to do so unless its enforcement be restrained.

III

Description of Network Broadcasting

The radio service rendered in the United States today is dependent upon the efficient functioning of a complicated and balanced organization. The nature and extent of the injury to NBC and to the public which will result from the Commission's Order can only be explained after a brief reference to how broadcasting is conducted and financed in the United States.

[fol. 227] In contrast to Europe, where the standard pattern for radio broadcasting is a Government monopoly

paid for by a tax on receiving sets, radio broadcasting in the United States has been developed to its present high standard by private initiative subject to a minimum of Government regulation.

When radio broadcasting was beginning in this country during the early 1920's, utilization of the great technical advances made by the radio industry was endangered by the difficulty of finding a source of revenue to meet the heavy expenses of broadcasting. The problem was how to finance a day by day series of musical, cultural, educational and other programs without expense to the listening audience.

After some experimentation, this source of revenue was found in advertising. Advertisers have continued to furnish the money which today enables over 800 commercial broadcasting stations to give the American people a broadcasting service unequalled elsewhere.

The fact that radio broadcasting is financed through advertising makes it necessary that broadcasting organizations be conducted in such a manner as to compete successfully with magazines, newspapers and other media seeking advertising revenue.

The local unit for broadcasting is the standard broadcast station which, in order adequately to serve the public interest, must carry its large capital investment, pay its expenses and earn its profits from the sale of broadcasting time to advertisers or to networks. The majority of such stations have a daily broadcasting schedule of 16 to 18 hours, 7 days a week, 52 weeks a year. This schedule makes necessary a constant flow of advertising contracts, programs, program talent, a high degree of engineering skill and unending planning. Such a station will enter into a contract with an advertiser to broadcast a particular program or series of programs over its facilities and derives its income from the sale of such service.

When only one station is involved, this transaction is relatively simple, but when the transaction involves the simultaneous broadcasting of the same program on a nation-wide scale over scores of independently owned stations the matter becomes an extremely complicated one.

Nothing short of clockwork precision suffices to effect the necessary changes in the line-up of stations between the [fol. 228] end of one network program and the commencement of the next. No end of painstaking planning and ad-

vance scheduling is required to operate a broadcasting network with station lineups constantly changing to meet the requirements of advertisers and a constant flow of accurately timed programs.

Commercial and Sustaining Programs: Programs paid for or "sponsored" by advertisers are known as "commercial" programs. In addition, it is necessary for broadcast stations in the intervals between commercial programs, and at times in place of them, to schedule so-called "sustaining" programs. Sustaining programs are not paid for by any advertiser but are furnished by the station or the network. To some extent these programs were originated because of the desirability of having a continuous broadcast schedule. Another reason for the use of sustaining programs was voluntary recognition on the part of broadcasters that programs of certain types, such as religious programs, informative programs furnished by various governmental agencies and certain programs involving discussions of political principles and other controversial issues, were not suited to advertising sponsorship. The use of high types of sustaining programs also creates good will for the station and induces people to become accustomed to listen to certain stations in preference to others.

Circulation: What a station has to sell to an advertiser is "circulation", which is produced by two factors. The first is the station's coverage, which may be defined as the number of radio families (i. e., families having radio sets) which can satisfactorily hear the programs broadcast by that station. Coverage is dependent upon the power and the frequency of the station, the physical nature of the terrain surrounding the station and the number of radio families in its vicinity. There are in the United States today three national network organizations, NBC, Columbia Broadcasting System, Inc. (hereinafter called CBS) and Mutual Broadcasting System, Inc. (hereinafter called Mutual). NBC, the oldest of the three, was organized in 1926 prior to the creation of the Federal Communications Commission or its predecessor the Federal Radio Commission.

Radio Station WJZ, which NBC acquired from Radio Corporation of America, its parent company, first became the sole property of Radio Corporation of America on or about May 15, 1923.

[fol. 229] For a period of three or four years subsequent to its acquisition of Station WJZ, Radio Corporation of

America operated this station without the support of any advertising revenue whatsoever.

Radio Corporation of America as early as 1923 connected Station WGY, Schenectady, with Station WJZ by wireline, thereby making its first network broadcast. This network which subsequently developed into the present Blue network was taken over by NBC upon its organization in 1926. At that time NBC also began operating the network known as its Red network. The second factor is the popularity of the programs broadcast by the station and all of the other elements creating good will for the station.

The combination of these factors determines the number of people who will be likely to hear a particular program, i. e., circulation. When a station is affiliated with a network, its circulation is increased by reason of the good will built up over a period of years by the network organization. The great majority of stations regard their network affiliation as one of their most valuable assets.

Network Broadcasting: Network broadcasting is the simultaneous broadcasting by two or more connected radio stations of the same program.

In the usual course, a network program is staged or originated in the studios of the network organization and is transmitted to the stations on the network by means of telephone lines leased from the telephone company by the network organization. Because of the speed with which electricity travels each station on the network is enabled to broadcast the program simultaneously.

It is network broadcasting that enables nation-wide broadcasting to be effected and that reflects the national aspects of the radio industry as distinguished from those of purely local character and significance. The average local station is incapable of selling enough advertising locally to round out its broadcasting schedule with commercial or sustaining programs in any way comparable with the quality of those furnished by the national network organizations.

This conclusion is confirmed by the unanimous result of surveys of all types relied upon in the broadcasting trade indicating that the audience of a radio station with a network affiliation is greater than that of a comparable station without such affiliation.

[fol. 230] The 310 standard broadcast stations not affiliated with any network in 1938 operated at an aggregate

loss of $149,107 in that year, 162 of them showing net incomes aggregating $888,493 and 148 of them showing net losses aggregating $1,037,600.

As a matter of history, nationwide network broadcasting owes its growth to the demand by standard broadcast stations for an adequate programming service, which, at least with respect to less favorably situated standard broadcast stations, is obtainable only through a national network drawing upon the great talent centers of the nation.

The development of some form of national network broadcasting was also a necessary corollary to radio's attempt to compete effectively for the advertiser's dollar—since it is a matter of common knowledge that a substantial number of American industries make standard products for national distribution and advertise such products nationally in magazines and other printed media having a national circulation.

It is this national advertising which makes possible the nation-wide network broadcasting of both commercial and sustaining programs of a higher quality than is possible with the resources of any individual station.

There are grave limitations on the type of service which an individual station can furnish. The programs originated by local stations are of necessity representative of the locality and not of the nation at large. What is more, no network which confines its broadcasts solely to such programs can do more than represent various separate localities. It cannot give the broader, more homogeneous national service necessary to the development and preservation of national unity and national culture, and to the enlightenment of the people with respect to problems affecting the nation as a whole.

The development of some form of nation-wide network broadcasting through a national organization was made inevitable by this limitation of the local broadcasting services, which could never be regarded as satisfying the need for a nationwide service.

Existing Networks and Network Organizations: NBC's Red and Blue networks were the first two networks in operation with national coverage and were pioneered by NBC at a time when there was no one else in the field with the foresight, courage and enterprise to engage in national net- [fol. 231] work broadcasting. It took bold money, guts and

brains to build in a field which was then new and hazardous. NBC invited competition at the outset and, in 1927, it welcomed the organization of CBS.

Between 1927 and 1934, the pioneer years of nationwide network broadcasting, the people of the United States relied upon NBC's Red and Blue networks and the CBS network for their national radio service. This service was developed and expanded throughout the worst years of the greatest depression this country has known. The value of the public service which was rendered during those years is incalculable.

Ultimately, in 1934, the Mutual Broadcasting System was organized and it attained a national status in 1936. The three existing national network organizations, therefore, presently operate four national networks, i.e., the NBC Blue, the NBC Red, CBS and Mutual.

Each of NBC's networks renders a national radio coverage. Its ability to do so is facilitated by the fact that NBC is licensed to operate key stations for programs originated by NBC's network organization, which stations are supplemented by arrangements or contracts with independently operated radio stations enabling such programs to be broadcast over such independent stations.

The network broadcasting services rendered by NBC today are the product of fifteen years of informed experience. Its organization has been conditioned by the needs of its growing, nation-wide business. NBC has a finely attuned organization for the conduct of a business that requires the precision of split-second timing.

At present both the network and the local standard broadcasting services are furnished by broadcast stations operating upon frequencies between 550 and 1600 kilocycles. In addition to these standard broadcast services, a distinct type of service is rendered by a number of powerful international broadcast stations situated in the United States. Although these stations may be heard within the United States, their primary audiences are located outside of its boundaries, in South America and in Europe. This service is expensive and it has a peculiar value in times of national emergency such as the present, but it is not commercially self supporting. As a result, NBC and CBS have furnished their contributions to this service out of revenues derived from standard broadcast operations.

[fol. 232] Affiliation: Each of the three national network organizations owns, operates or controls relatively few stations. Out of a total of 70 stations affiliated with its Red network, 99 stations affiliated with its Blue network and 54 stations affiliated from time to time with one or the other of said networks, as of June 1, 1941, NBC owned and operated only 7 standard broadcast stations and leased and operated 3. Out of a total of 119 affiliated stations, as of June 1, 1941, Columbia owned and operated 7 standard broadcast stations and leased and operated 1. Mutual is a network organization owned in unequal proportions by a number of stockholders, each of which operates or controls a minimum of 1 standard broadcast station. As of June 1, 1941, Mutual had a total of 176 affiliates, including stockholders. In no case could the stations now owned, leased or operated by a network organization effect nation-wide broadcasting and satisfy the nation-wide needs of national advertisers.

In order to effect simultaneous nation-wide broadcasting it is necessary for the network organization to enter into arrangements with independently owned and operated standard broadcast stations throughout the country whereby network programs can be broadcast over the facilities of such stations. An independently owned station which enters into such an arrangement with the network organization is known in the trade as an "affiliate" of the network organization, and the contract embodying the arrangement is known as an "affiliation" contract.

Thus, nationwide network services reach the radio audience as a result of cooperation between a network organization operating a few key stations and a large number of independently owned and operated standard broadcast stations affiliated with such network organization.

It must be remembered that there are many affiliates associated with each network organization (there being 99 on the NBC Blue alone) and each of these affiliates is, in addition to broadcasting network programs, engaged in the business of selling time for commercial programs to local advertisers and arranging his own schedule of local sustaining programs.

The significance of the affiliation contract between station and network organization is that it expresses the terms upon which the parties can cooperate to furnish a national broadcasting service without displacing the legitimate requirements of the local broadcasting services. These af-

[fol. 233] filiation contracts are not based upon theories or assumptions. They simply embody the working principles that have in practice resulted in a national and local radio service which has won general public approval and which is unequalled elsephere.

Obviously, the value to an advertiser of time on or programs to be broadcast from any single station is far less than the value to him of time and programs to be broadcast on a national network, and consequently he spends larger amounts of money for the national service and for the programs to be used thereon. This difference is reflected in the overall standard of service furnished by local stations as compared to national networks. It is also obvious that the quality of local service furnished by a powerful station in a metropolitan area varies widely from that furnished by a small station in a rural area, mainly because of the different value of the respective stations to advertisers. Network broadcasting equalizes these differences, since the small rural station and the powerful metropolitan station broadcast the same network program at the same time to the advantage of the less fortunately situated communities.

A national network raises operating problems which are infinitely more complex than those encountered in the operation of a single station. For example, national advertising involves the expenditure of large sums of money, both for station time and for program talent. Magazines and newspapers offer to such advertisers advance assurance of the circulation they desire in the markets wherein they sell throughout the period of an advertising campaign. To successfully compete with these other advertising media, the national networks must be able to offer a reasonable assurance of circulation, but in order to do so, they must be able to clear specified periods of time on many radio stations, each of which is simultaneously preparing its own schedule of local commercial and sustaining programs.

The efficiency of current broadcasting operations is traceable directly to the operation of key stations by the networks and to existing station-network affiliation contracts embodying the principles which have in practice produced our present high standard of nation-wide broadcasting services.

[fol. 234] Affiliation Contracts: In most cases, NBC's contract of affiliation with independent stations provides in general that:

1. NBC will at its own expense pay for special telephone wirelines connecting the originating point of the program to the station.

2. The station grants NBC an option to sell certain specified periods of the station's time, exercisable on 28 days' notice. This means that any one purchasing a segment of time from NBC, within the specified periods, for a program serving the public interest, convenience and necessity can be assured of full network circulation upon 28 days notice.

3. NBC will supply the station with a full schedule of sustaining programs, without monetary payment by the station or any obligation whatever upon the station to take any of said programs.

4. As compensation for the network services rendered by NBC, including the furnishing of sustaining programs by NBC, the assumption of wireline charges and the service of selling the stations' time, NBC retains a certain portion, and pays the stations the balance, of the proceeds which it receives from advertisers for the sale of network time.

For the station, the affiliation contract is equivalent to a firm obligation to sell certain hours of its time on 28 days notice. In return, NBC must assume the expense of a wireline connection with the station, must undertake to provide suitable sustaining programs on a daily basis, and must sell enough time to national advertisers to support the entire structure.

Each of these provisions is based upon the reasonable needs of the service.

(a) *Wirelines:* When broadcast stations are connected for a network program, the connection is made, with telephone wireless which, because of the need for high fidelity transmission and the great distances involved, are extremely expensive to maintain. These connections are maintained between NBC and all of its affiliated stations throughout the broadcast day so that NBC may offer a continuous schedule of commercial and sustaining programs which will

[fol. 235] be available to affiliated stations at any time in order to supplement their local offerings.

NBC endeavors so far as is reasonably possible to undertake in each of its affiliation contracts to assume the expense of such telephone wirelines between its network organization and the station on an annual basis. On the one hand, this practice enables the stations to obtain network programs more readily because of their continuous availability. On the other, it places upon the network rather than upon the individual stations the risk, so far as wireline expense is concerned, that the network operations of the particular station will not be profitable in any given period.

The expense involved is by no means nominal. NBC's wireline expenses in 1940 aggregated in excess of $3,600,000.

(b) *Network Optional Time:* The optional time provision is the balance wheel which regulates the cooperative efforts of the network organization and its affiliated stations in the production of a nationwide broadcasting service. It affects every aspect of the network business, including the relations between the network organizations and advertisers as well as the relations between the network organizations and affiliated stations.

As has been previously stated, the national advertiser negotiates for and buys radio time solely on a commercial basis. He will insist upon a national circulation and, if he cannot get it from the radio network, he will divert his money to newspapers, national magazines and other media, to the detriment of the radio service.

Such advertisers spend considerable sums on an advertising campaign, and there is keen competition for their business. The optional time provision in network affiliation contracts enables the network organizations to negotiate with such advertisers on the basis of an assured national coverage up to 28 days prior to the first program. It also enables the networks to enter into a contract with such advertisers as soon as the parties have agreed upon terms.

It must be remembered that NBC's Blue network, for example, has 99 affiliates, each of which is compiling daily its individual schedule of commercial and sustaining programs. Under such circumstances, there is every likelihood that NBC will find, upon investigating the possibility of scheduling a network program for a certain hour of a specific day, that a number of stations will have conflicting

[fol. 236] commitments. In the absence of network optional time, the unwillingness of a single station located in a market indispensable to an advertiser to accept a particular program would cause the advertiser to withdraw and would consequently defeat the desire of all of the other stations to carry that program.

At the present time, an advertiser using the Red network during the evening hours is required to contract for the use of a minimum of fifty stations, of which only six are operated by NBC itself. Consequently, in the absence of network optional time, each and every advertising contract negotiated for such hours on the Red network would require successful negotiation by NBC with a minimum of forty-four stations.

From the point of view of NBC's relations with advertisers, network optional time on a firm basis is a *sine qua non* of negotiation and contracting. The advertiser wants to know what he is buying before he buys it. If a tentative period of time is fixed for his program, but no contract can be entered into before forty-four or more stations have been contacted and the consent of each obtained, the advertiser may well have changed his mind. If stations refuse for any reason to clear time for the advertiser's program, he may refuse to consider a substitute period. Without optional network time, therefore, NBC must deal with advertisers on an "if, as and when" basis in competition with other media doing business on a firm basis.

From the point of view of NBC's relations with its affiliated stations, network optional time is necessary in order that the business may be conducted on a big enough scale to pay the out-of-pocket expenses thereof. As will hereinafter be more fully explained, NBC's expenses in 1940 for network and key station operations, exclusive of all international broadcasting or other non-standard broadcasting expenses, aggregate more than $17,900,000. It is a human impossibility to obtain unanimity among the large number of necessary affiliates a sufficient number of times to carry this load.

It must be remembered that the 8½ hours governed by network optional time leave ample periods within which stations can schedule local programs, since the majority of such stations have a daily broadcasting schedule of from 16 to 18 hours. What is more, the programming of a single

[fol. 237] station operating under these optional time arrangements is infinitely simpler than the programming of a network in the absence of such provisions.

(c) *Sustaining Programs:* The sustaining programs furnished to the affiliated stations by NBC's network organization have a three-fold importance. First, they are of such quality that there is no dissent from the proposition that they serve the public interest. Second, their popularity is so great that they render a valuable service both to the network and to the affiliated stations by creating large audiences and consequent good will. Finally, the expense of supplying these programs goes far to explain the necessity for efficient network operations.

Musical sustaining programs include the Music Appreciation Hour, conducted by Walter Damroch and concerts by the leading symphonies of the country. The NBC Symphony Orchestra has been created exclusively for radio, and its programs, under the leadership of such celebrated conductors as Arturo Toscanini and Leopold Stokowski, are broadcast as sustaining features from New York. For the last twelve years, NBC has broadcast the National Farm and Home Hour in cooperation with the United States Department of Agriculture at an annual cost of $100,000. NBC also provides a continuous nationwide news service gathered from all parts of the world.

In addition, NBC makes its facilities available to religious groups of all denominations, to radio forums such as America's Town Hall Meeting of the Air, the Chicago Round Table and the National Radio Forum.

During 1940, NBC's aggregate schedule of network sustaining programs, involving over 35,000 broadcasts, required the expenditure of more than $3,000,000 for talent and material alone. During the same period, NBC's other expenses for network and key station operations, such as rent, sales, wirelines, engineering, staff, etc., aggregated over $14,900,000.

(d) *Miscellaneous Contract Provisions:* There are several provisions customary in contracts of affiliation between NBC and its independent station affiliates which are in all respects reasonable.

One example is the provision expressly allowing any affiliated station to reject a network program offered under [fol. 238] the terms of the contract if such program is not in

the public interest, convenience or necessity.' This provision leaves the station entirely free to protect its legitimate interests as a licensee bound to operate in the public interest, convenience and necessity.

Network Operation of Key Stations.—It will be recalled that each nationwide network organization, as well as operating through affiliation contracts with independently operated standard broadcast stations, itself operates several key stations for network broadcasting. NBC, having two networks, operates two stations in each of the cities of Washington, New York, Chicago and San Francisco, each of these stations being a key station in one or the other of NBC's networks.

For example, NBC operates Station WJZ in New York as a key station of the Blue network and this station was acquired by NBC in 1931. Similarly, NBC acquired Station WEAF in New York, which it now uses as a key station for the Red network, as early as 1926.

These key stations now operated by NBC are not many in number, but they are vitally important to the efficient operation of its business of network broadcasting. They minimize operational difficulties; they serve as originating points for major programs; and they are useful as laboratories for new ideas which may later be used on the entire network. They are the focal points of network operations and without them it would be impossible to furnish the network services enjoyed by the radio audience today.

Revenue: Networks must graduate their rates to advertisers upon the basis of the circulation that they can offer, that is to say, the probability that prospective customers will be listening to network programs. Network circulation is basically the sum of the circulations of each of the stations forming the network for a particular program, so that the network's revenues will vary directly with the availability of individual stations for a particular program. Augmenting this circulation, and consequently augmenting the network's revenues, is the additional circulation caused (as is shown by surveys of all types relied upon by the broadcasting trade) by the fact that listeners will be attracted to a particular network by reason of the goodwill that the network's circulation has enabled it to build up [fol. 239] over a period of years in the broadcasting of commercial and sustaining programs of high quality.

These factors are cumulative in nature. Any change in the provisions of affiliation contracts which would inhibit the network from offering its full circulation will endanger the entire network broadcasting structure as it exists today. Any hindrance to the ability of a network to offer its full circulation as based upon the number of affiliated stations available for a particular program, or the availability of a station in any key market, will result in an inevitable spiral of injury to the economic interests of network and affiliate. This injury increases in geometric progression, because any interference which blocks off affiliated stations necessarily lowers network revenues and this, in turn, requires a curtailment of program service which, in turn, further decreases the revenue to be received by the network and its affiliates.

IV

Injury Resulting From the Order

Impact of Order: The Order of the Commission, insofar as it purports to become effective on or before November 15, 1941, impacts network broadcasting at two vital points:

First: It requires an immediate revision of the contractual arrangements between individual standard broadcast stations and network organizations in a way which will make adequate nation-wide network broadcasting impossible; and

Second: It prohibits (a) ownership by a network organization of more than one station in any given locality, and (b) the ownership by a network organization of one of a few stations, or the most desirable station in a given locality.

Option Time: At present NBC is able to sell network time for commercial programs to national advertisers on the basis of an assured national circulation for specified hours of the day by giving its affiliated stations 28 days advance notice. NBC's ability to do this is basically dependent upon the time option provision in its contracts with affiliated stations, as hereinabove described, which enables NBC to sell network programs within the optional [fol. 240] time period and enables the affiliated station to use the balance of the day for such local programs as it sees fit.

As originally promulgated on May 2, 1941, paragraph 3.104 of the Commission's Order, as stated in the verified Complaint herein, prohibited the inclusion of any optional time provision in any contract of affiliation between a network organization and a standard broadcast station. As amended on October 11, 1941, said paragraph, as stated in said Complaint, prohibits the inclusion of an optional time provision in any contract of affiliation valid as against any other network organization, national or regional. Said paragraph, as amended, moreover, prohibits a station from agreeing to clear its time of non-network programs for NBC upon less than 56 days notice. The same paragraph prohibits any option provision in any such contract which may "prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

Said paragraph 3.104 divides the broadcast day into four segments (8 A. M. to 1 P. M.; 1 P. M. to 6 P. M.; 6 P. M. to 11 P. M.; 11 P. M. to 8 A. M.) and permits a station to agree to clear time of non-network commitments upon 56 days notice, so long as the time subject to call on this so-called "option" does not exceed a total of three hours within each of said four segments.

The effect of the amended paragraph 3.104, like that of the original, will be destructive of nationwide network broadcasting, to the detriment of the other radio services supported thereby. The vice of this amended paragraph is its failure to recognize that national network organizations must be able to *clear* time on affiliated stations in order to render a nation-wide service and that the identity or character of the organization which interferes with such clearance is immaterial. In addition to NBC there are at present two nation-wide networks, one operated by Columbia Broadcasting System, Inc. and the other by Mutual Broadcasting System, Inc., as well as a number of regional networks, and each of these networks, whether national or regional, will be able to block an NBC network program under the amended Order.

In operating under the Order, NBC would be forced to negotiate a sale of network time to a national advertiser, for example, on the Blue network upon an "if, as and [fol. 241] when" basis with respect to each of the 99 affiliated stations until all of the stations indicated that the

particular time desired by the advertiser would be available.

National network advertising contracts are customarily entered into for a period of one year, subject to the right of the advertiser to cancel at the end of any thirteen-week period. Under the Commission's Order, before NBC could agree to enter into an advertising contract with an advertiser for a commercial program, it would first have to communicate with each station to determine whether such station had available the particular period of time desired.

At the present time an advertiser using the Red network during the valuable evening hours is required to contract for the use of a minimum of fifty stations, of which only six are operated by NBC itself. Consequently, if optional time is prohibited, each and every advertising contract negotiated for such hours on the Red network would require negotiation by NBC with a minimum of 44 stations. In the normal course of its business, each of these stations would, under the Commission's amended Order, be scheduling the programs of other networks. Despite these conflicting demands, therefore, NBC would have to obtain the unanimous consent of not less than 44 persons, firms and corporations for each program scheduled.

This problem is intensified in cases where the advertiser desires a line-up of 100 stations or more. The further fact must be considered that clearance must be accomplished for each of the many network programs broadcast. In order to save itself and its affiliated stations from damage, NBC would have to accomplish this feat a sufficient number of times annually to assure itself of a gross income of more than $17,900,000, which amount is spent in maintaining NBC's network and key station broadcasting services inclusive of wirelines.

Optional time is as necessary for the practical operation of network broadcasting as traffic lights are for the practical flow of vehicular traffic. The Order is no more workable than an ordinance permitting each vehicle to operate the traffic lights to suit its own convenience, and the same chaos will result from its enforcement.

Elimination of network optional time on a firm basis under the Order of the Commission will cause irreparable [fol. 242] injury to NBC and its affiliated stations by making it financially and physically impossible to handle a sufficient volume of business to support the existing programs of the

network organization. Abolition of such optional time will inevitably lead to increased expenses to NBC and its affiliated stations as well as a reduction in network revenue and a consequent diminution in the quality of programs, thus setting in motion a vicious descending spiral. Such injury will result from the Commission's Order even though NBC and its affiliated stations take no action other than to amend their respective affiliation contracts so as to bring them into conformity with the Commission's Order.

The requirement that the station may agree to clear its time of non-network programs only upon 56 days notice will have the practical effect of an absolute prohibition against network optional time. It is a matter of common knowledge in the advertising business that national advertisers insist that a specific advertising program be placed before the public shortly after the contract is signed. This insistence is not peculiar to radio advertisers. For example, magazines having a national circulation have found it necessary to shorten the period between the deadline for advertising copy and publication.

The 28-day notice required in existing option time provisions was not determined theoretically, but is the result of an experienced balancing of the needs of the stations and needs of the advertisers, since the networks must satisfy the legitimate needs of both in order to exist. The 56-day period flagrantly disregards the practical necessities of the advertising business. National network organizations will have to satisfy the advertisers by clearing time on less than 56 days notice under penalty of losing to competitive advertising media the revenues which support the existing broadcasting services. As a result, NBC will have to negotiate for time on its affiliated stations on the basis of the 28-day notice period which has resulted from experience and in so doing will be unable to clear such time as against local commercial programs, local sustaining programs and other non-network programs, any one of which may defeat the scheduling of a network program.

The inevitable consequence will be the destruction of nation-wide network broadcasting to the irreparable injury of NBC.

[fol. 243] Threatened License Revocations: In effect the Order requires, and has been construed by the Chairman of the Commission as requiring, the amendment of contracts immediately upon the date that it purportedly becomes ef-

fective with respect to existing contracts, arrangements and understandings, inasmuch as the Commission in its Report (Exhibit D attached to the verified Complaint herein) has expressly stated that operation by a station under an affiliation contract containing prohibited provisions is not operation "in the public interest". Since the Commission in considering applications for renewal of the licenses of standard broadcast stations concededly weighs evidence of each act of the station during the preceding licensing period deemed by it not to have been in the public interest, many of said stations will be impelled to discontinue operation under the prohibited contract provisions immediately upon the effective date of the Order. On June 2, 1941, moreover, Chairman Fly of the Commission, appearing officially on behalf of the majority of the Commission before the Committee on Interstate Commerce of the United States Senate, stated that the Commission would issue an order revoking the license of any station which retained an affiliation contract containing the prohibited provisions beyond the effective date of the Order.

Contract Cancellations: Between May 2, 1941 and the date hereof not less than 24 standard broadcast stations having effective contracts of affiliation with NBC containing one or more contract provisions described in paragraphs 28 through 35, inclusive, of the verified Complaint herein have served upon NBC notice of cancellation of their respective affiliation contracts and such action has been taken by such affiliated stations as a direct result of the Commission's Order, as stated in the respective notices of cancellation. In addition, not less than 24 other stations having effective contracts of affiliation with NBC containing such contract provisions have served notice that such stations do not intend to abide by the terms of such contracts unless such terms are conformed to the Order of the Commission. Furthermore, NBC knows of a substantial number of additional stations which, unless the Order is complied with, intend to terminate such contracts upon the effective date of the Order. NBC has and will continue to [fol. 244] suffer irreparable injury as a result thereof, for reasons which are evident from the facts hereinabove stated.

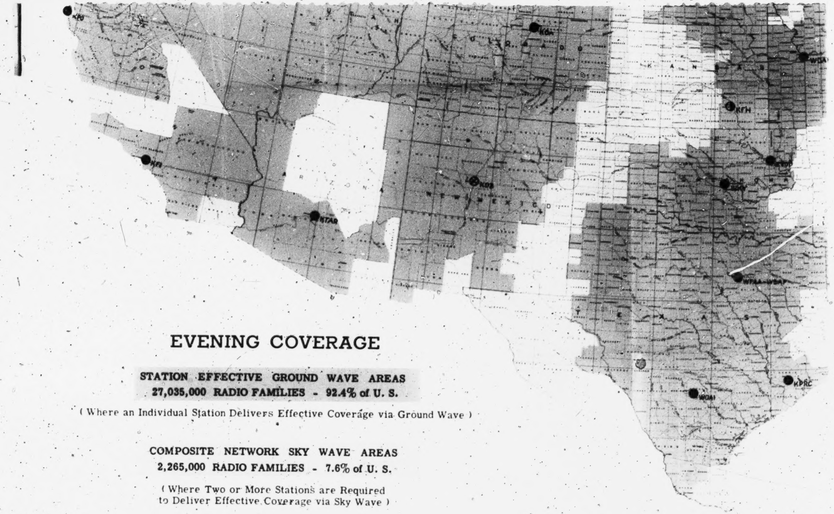
Interference with New Affiliations: Between May 2, 1941 and the date hereof a number of independently owned and operated radio stations not affiliated with NBC have informed NBC of their desire to enter into an affiliation

EXHIBIT I

'WORK POSSIBLE AFTER AUGUST 1

STATIONS





EVENING COVERAGE

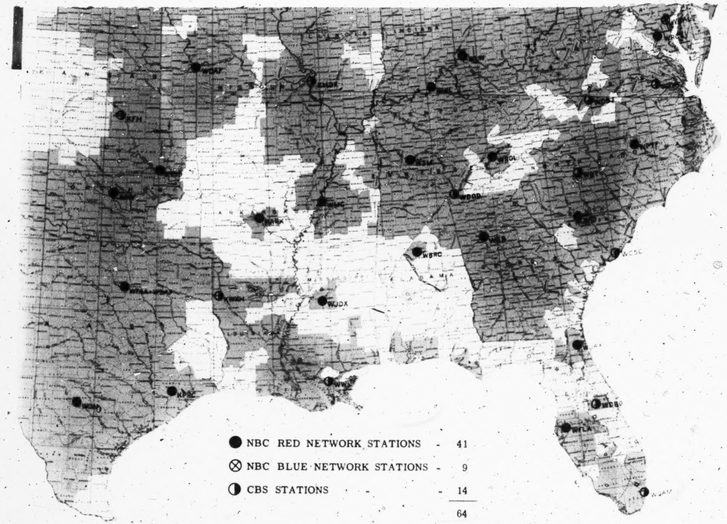
STATION EFFECTIVE GROUND WAVE AREAS
27,035,000 RADIO FAMILIES - 92.4% of U. S.

(Where an Individual Station Delivers Effective Coverage via Ground Wave)

COMPOSITE NETWORK SKY WAVE AREAS
2,265,000 RADIO FAMILIES - 7.6% of U. S.

(Where Two or More Stations are Required to Deliver Effective Coverage via Sky Wave)

Source: NBC All-County Surveys of Market Listening Habits, February, 1947
Radio Families Figures Based on 1946 Estimates



● NBC RED NETWORK STATIONS	-	41
⊗ NBC BLUE NETWORK STATIONS	-	9
◑ CBS STATIONS	-	14
		64

COST PER EVENING HALF-HOUR — $12,015.00

contract with NBC containing among other things many of the provisions prohibited by the Order of the Commission. As a result of its inability to enter into such affiliation contracts NBC has been directly injured. In a few isolated instances since May 2, 1941 new and relatively unimportant stations have been added to NBC's network, without contracts of the prohibited sort, on a temporary basis pending the ultimate disposition of the matter at issue.

In the normal course of NBC's network broadcasting business certain contracts of affiliation lapse or are terminated by mutual consent of the parties thereto for a variety of reasons. In such normal course of business, moreover, NBC enters from time to time into new contracts of affiliation with different independent radio stations. As a result, in so far as the exigencies of business permit, the aggregate number of affiliated stations does not decrease and may, and has, in the past, continued to increase despite the lapse or termination of contracts as aforesaid.

There is a direct relation between the net profits of NBC and those of its affiliated stations and the number of independent radio stations affiliated with NBC. Any factor which causes a diminution in the aggregate number of such affiliated stations, such as the Order of the Commission, damages NBC and each independent broadcast station affiliated with NBC.

Diminution of Income: A number of present NBC advertisers as well as prospective NBC advertisers to whom NBC has offered to renew existing contracts or has offered new contracts for the broadcasting of commercial programs have refused to enter into said contracts upon the ground that NBC would, under the Order, be unable to assure said advertisers of the continued availability of stations presently affiliated with NBC throughout the term of said proposed advertising contracts.

[fol. 245] Prohibition Against Network Ownership of Stations: Paragraph 3.106 of the Order of the Commission requires any network organization (a) to dispose of any standard broadcast station in excess of one where any two or more stations operated by said network cover substantially the same service area; and (b) to dispose of any standard broadcast station where such station is the only, or is the most desirable, station in a given locality. As a direct result of this paragraph of the Order, NBC would

have to dispose of one of the two stations now operated by it in New York, Chicago, Washington and San Francisco. With respect to stations operated by NBC in Cleveland and Denver, the position of the Commission is expressed in the following quotation from page 68 of the Report accompanying said Order of the Commission: "In Cleveland, a most important radio market, the only broadcasting facilities are one clear-channel station (owned by NBC), two full-time regionals, and one part-time regional. Charlotte, N. C., has but two stations, one of which is a 50,000-watt station owned by CBS. It seems clear that no network ownership whatsoever should be allowed in either of these cities. In several other cities, such as Denver (NBC), Minneapolis (CBS), and Washington (NBC and CBS), the available facilities are somewhat more plentiful, but the disparity among the facilities raises serious doubts whether any network ownership should be permitted."

NBC's network operations are conducted over two groups of broadcast stations which are commonly known as the "Red" and "Blue" networks. NBC in 1926 began operation of both its Red network and the network that later became the Blue network. In broadcasting radio programs, the Red network and the Blue network generally operate separately, one program being broadcast from the stations on the Red network while a different program is simultaneously broadcast from the stations on the Blue network, although, in exceptional cases, the Red and Blue networks may be combined to broadcast the same program. Each of these networks is national in scope and there is a substantial overlap in the territories served by them as well as the territories served by the individual stations affiliated with the Red and Blue networks, respectively. NBC itself operates, in all, ten radio stations and these stations are divided between the Red and Blue networks in the fol-
[fol. 246] lowing manner: (The stations are owned by NBC except as otherwise indicated.)

Red Network	Location	Blue Network
WEAF	New York, N. Y.	WJZ
WMAQ	Chicago, Ill.	WENR
WRC	Washington, D. C.	WMAL (Leased)
KPO	San Francisco, Cal.	KGO (Leased)
KOA (Leased)	Denver, Colo.	—
WTAM	Cleveland, Ohio	—

NBC, like each of the other nationwide networks operated in the United States today, uses stations operated by the network organization itself in key markets as a nucleus for network operations, a practice of long standing. For example, NBC operates Station WJZ in New York as a key station of the Blue network, and this station was acquired by NBC from Radio Corporation of America in 1931. RCA became sole owner of said station on or about May 15, 1923, and had used the same as the key station for network broadcasting beginning as early as December, 1923. Similarly, NBC acquired Station WEAF in New York, which it now uses as a key station for the Red network, as early as 1926.

The key stations now operated by NBC are not many in number but they are vitally important to the efficient operation of its business of network broadcasting. They minimize operational difficulties; they serve as originating points for major programs; and they are useful as laboratories for new ideas which may later be used on the entire network. They are the focal points of network operations and without them it will be impossible to furnish the network services enjoyed by the radio audience today.

The Order, in so far as it deals with the operation of two stations or the best station in a particular locality by a network organization, will compel NBC to dispose of stations without regard to this vital factor of network operations and will necessarily have a destructive effect upon NBC's business, all to its great damage and the damage of its affiliated stations. NBC will also be injured by paragraph 3.106 of the Order by loss of revenues and good will which will result from its inability to furnish, without greatly increased expense, facilities for broadcasting from the [fol. 247] point of origin outstanding commercial programs and sustaining programs of all types.

For example, the vast majority of the talks broadcast over NBC's networks by members of Congress and representatives of the executive branch of the government originate in one of NBC's two Washington stations.

NBC will also be damaged by this paragraph by loss of value incident to a forced sale and by destruction of value incident to NBC's inability to dispose of a leased station because of lack of provision for assignment in the lease.

V

Effect of order is contrary to public interest, convenience and necessity.

The facts hereinabove stated with respect to the basic requirements for the operation of a nation-wide system of network broadcasting which uses the same stations that are engaged in furnishing a local broadcasting service make the conclusion inescapable that the Order will bring about a situation in broadcasting in the United States which is so patently contrary to the public interest, convenience and necessity as to make its issuance an arbitrary and capricious act of the Commission.

It has been made plain that broadcasting in the United States today is supported by the dollars received from national and local advertisers. Inasmuch as the advertising dollar is used to sustain this system of broadcasting, the advertiser is largely influential in determining the distribution or line-up of stations on commercial programs. General Foods for its Jello program may require a different line-up of stations from those that General Foods may require for its Maxwell House Coffee program, and the stations required by the Packard Motor Car Company differ radically from those demanded by Colgate-Palmolive-Peet. Each advertiser, within requirements set by the networks, attempts to custom-build his network to his own needs.

Minimum Requirements: Although the advertiser is thus in a position of significant influence in the choice of stations which will carry his program, his choice must today be made within the confines of certain restrictions which the networks through experience have found it advisable to [fol. 248] establish. One such restriction is a requirement that a network advertiser purchase not less than a fixed minimum number of stations. This requirement has been largely instrumental in insuring national coverage of radio programs.

An illustration of such minimum requirements is the fact that ten years ago an advertiser could purchase during the evening hours as few as ten stations on the NBC Red network for his program. Some years later this minimum requirement was increased to 23 stations and today, during the important evening hours, it is necessary for an adver-

tiser to buy a minimum of 50 stations on NBC's Red network.

Effect of Minimum Requirements: The establishment of minimum station requirements for network broadcasting has been adopted at least in part by all of the national networks operating today and these requirements have served the public interest in four respects:

First, they have enabled the networks to give the United States a truly nation-wide radio service.

Second, they have enabled more stations better to serve more people in their communities with outstanding radio entertainment.

Third, they have enabled the networks to give their respective affiliated stations, particularly the smaller ones, more hours of outstanding programs and more dollars of commercial revenue.

Fourth, they have produced increased revenue for the networks, not only for profit but for investment in more and better sustaining and public service programs and for research and development of new services (such as television) on which NBC has already spent several millions of dollars.

In addition to the establishment of these minimum requirements, the network, with its sales organization, acts as network sales agent for each of its affiliated stations. In conjunction with each and every commercial account the network sales organization does everything in its power to convince the advertiser that it is profitable for him to employ a maximum number of stations in his line-up in excess of the network's minimum requirements.

The Order of the Commission makes it practically impossible for NBC and the other networks to continue to [fol. 249] maintain their respective minimum station requirements, and thus damages both the public and the stations. In place of the existing arrangements, the Order will substitute a system favoring the large stations and the large advertisers, for it is fallacious to assume that the stations and the networks can operate as they have when the Order of the Commission becomes effective.

Advertising Super-Network: The large national advertiser is, as a matter of experience, thoroughly familiar with the coverage and popularity of practically every station in

the United States. Such advertiser desires to purchase the best network—that is to say, the network that will give him the greatest audience at the lowest cost—and he will be enabled by the Order to put together a network line-up heretofore unavailable by selecting the best stations, and only the best stations, from all networks.

Thus, an advertiser can approach NBC under the Order and insist upon buying a network which consists not of NBC stations alone, but one built up of the best stations of the NBC Red, the NBC Blue, the Columbia and the Mutual networks. If NBC should decline to act as sales agent for the deal, there is nothing to prevent the advertiser or his agency from negotiating directly with the stations, contracting for telephone wirelines and establishing his own network for his program.

Attached hereto as Exhibit I, and by reference made a part hereof as fully as if set forth herein, is a map of a 64-station network (hereinafter referred to as the "No. 1 Advertiser Network") built up in the manner described above, which network will be available to national advertisers under the Order of the Commission. This network does not show a theoretical line-up of stations, but represents the stations selected by a well-known advertising expert as typifying what he would like to purchase for his clients when enabled to do so under the Commission's Order.

This No. 1 Advertiser Network of 64 stations affords excellent coverage of 92.4% of the radio families in the United States, and good coverage of all of the remainder of such families.

Upon the assumption that the No. 1 Advertiser Network is used by an advertiser from 9 to 9:30 o'clock on a Monday evening, Exhibit II hereto attached, and included herein by reference as fully as if set forth herein, illus- [fol. 250] trates the network which if will be necessary for a second advertiser to buy even to approximate the coverage achieved by his competitor who bought time on network No. 1. Such a second advertiser would be required to include 160 stations and would obtain excellent coverage of only 76.4% of the radio families in the United States and good coverage of an additional 7.7% of such families.

Exhibit III attached hereto, and by reference made a part hereof as fully as if set forth herein, is a map showing the stations available to any third advertiser who

might desire to go on the air at the same time Monday night as the advertisers who bought time on networks No. 1 and No. 2. Regardless of the number of stations this third advertiser might desire to buy or even the amount of money that he might be willing to spend, it would be impossible for him to acquire any network line-up which would give him a national coverage equal to that of his competitors. The best remaining network line-up possible would necessitate the use of 191 stations and would provide excellent coverage of a mere 65% of the radio families in the United States and good coverage of an additional 2.2% of such families.

The Commission on October 11, 1941 amended paragraph 3.102 of the Order so as to permit a provision in affiliation contracts giving the station "first call" on the programs of a particular network organization. This was intended, as is shown by the Commission's Supplemental Report (Exhibit E to the verified Complaint herein) to obviate objections to the original Order along the lines indicated above. It does nothing of the sort. As is evident from the foregoing facts, the growth of advertisers' super-networks will be due not to the stations' inability to obtain network programs, but to the networks' inability to obtain first call on the time of their affiliated stations and the amendment completely fails to remedy this defect in the Order.

Cost of Coverage: That the above-mentioned facts are by no means hypothetical and that a situation of the type above described will result from the Order of the Commission is clearly shown by the fact that the above-described No. 1 Advertiser Network, despite its unprecedented coverage, will cost the advertiser less than the present NBC Red Network or the present Columbia network or the No. 2 or No. 3 Advertiser Network. No. 2 Advertiser Network, with less coverage, moreover, not only will cost more than [fol. 251] the present NBC Red or Columbia networks, but it will cost more than the super-network No. 1.

Effect on Public Interest: Truly national coverage under the Commission's Order will become the opportunity of a relatively few major advertisers, and the bulk of the advertising revenue of the United States will go to a relatively few of the country's major stations. There will be only one rather than four national radio networks worthy of the name and this result is obviously contrary to the public interest, convenience and necessity.

VII

Summary

The nationwide network broadcasting services enjoyed by the United States today are the fruit of fifteen years of hard work and far-sighted development by everybody connected with the broadcasting industry. Without governmental subsidies, in the face of a shattering depression and despite an unusually high rate of obsolescence, the broadcasters risked their money and used their brains with the result that this nation has a network broadcasting service which is unequalled in any other country of the world and which represents a national asset of incalculable value in a time of emergency.

There is scarcely an industry in this country today which can point to a record as clean as that of the broadcasting industry. Its organization and business practices have never been kept secret and the very contracts to which the Commission now objects have been on file with the Commission ever since they were entered into. Year after year the operation of the NBC networks has been certified as being in the public interest by the issuance and renewal of hundreds of station licenses by two Commissions.

Now, on the basis of armchair theories, over the vigorous dissent of two of its members, a majority of the present Commission would destroy the structure supporting American radio. There was no sensational discovery in the Commission's three-year study of network broadcasting to justify this wrecking operation. The Commission was only able to criticize isolated incidents so few in number as to add to, rather than to detract from, the character of the broadcasters.

[fol. 252] The Commission's ban upon firm option time represents a refusal to take account of the practical necessities of network broadcasting even as recognized by the Commission itself. The sum and substance of NBC's position as to the effect of the Order forbidding the networks to obtain firm options on station time is succinctly expressed in the words of the Commission majority, as contained in the Report of May 2, 1941:

"Few sponsors are willing to spend large sums in building up a program series to be broadcast over a definite number of stations at a certain hour if some of the impor-

tant stations are subject to withdrawal upon order of a dominant network."

Withdrawal or refusal, upon order of a "dominant" network, upon order of any network or upon order of a local sponsor, as pointed out above, the vital issue is that time must be cleared on not more than 28 days notice if network broadcasting is to be supported by the advertisers. The effect of the loss of advertising revenues upon network broadcasting services will be direct and disastrous.

The Commission also proposes to compel NBC to dispose of the key stations which are vital to its network operations and which are renowned for the quality of the service they furnish. The quality of the service rendered by these stations has largely been due to their operation by NBC, and their forced disposal will not only damage NBC but will also work to the prejudice of the interests of the listening public.

The Commission's pious expressions of horror at the "monopolistic" tendencies of four vigorously competing national networks, rendering a valuable and laudable service, raise serious questions as to its understanding of the whole problem of broadcasting when placed beside the plain fact that its Order will create a complete monopoly by a single super-network capable of stifling all competition.

It is plain from the facts hereinabove stated that NBC has suffered and will continue to suffer irreparable injury as the direct result of the Commission's Order unless enforcement of the same be restrained. On the other hand, the Commission has plainly conceded that continuance of the *status quo* pending a final court determination on the issues raised by NBC in this proceeding will not be inimical to the public interest.

[fol. 253] The Commission's Order was first issued on May 2, 1941 and in so far as it deals with existing contracts and station ownership, the effective date thereof has been postponed by the Commission itself for a period of over six months. If the public interest has not been injured by such temporizing by the Commission, it can scarcely be contended that any vital interest will suffer as a result of a stay pending a hearing in this proceeding.

Furthermore, when Chairman Fly of the Commission appeared on behalf of the majority of the Commission be-

fore the Committee on Interstate Commerce of the United States Senate on June 2, 3 and 4, 1941, Chairman Fly several times stated in effect that the Commission would be willing to have broadcast stations continue operations under existing conditions pending a court determination of the power of the Commission. For example, on June 3, 1941 Senator Clark of Idaho asked Chairman Fly:

"If the broadcasting chains that feel themselves aggrieved by your regulations should decide to go into court and test out the question of jurisdiction, or whatever other question might be permissible, I take it from your statement that as long as the court proceeding was undetermined you would not press the matter, even though an injunction or something of the kind might not be obtained from the court. In other words, you would not undertake to force the doing of something that could not reasonably be done within that limit [the original 90 day postponement of the effective date] in the interest of the industry. Do I make myself clear?"

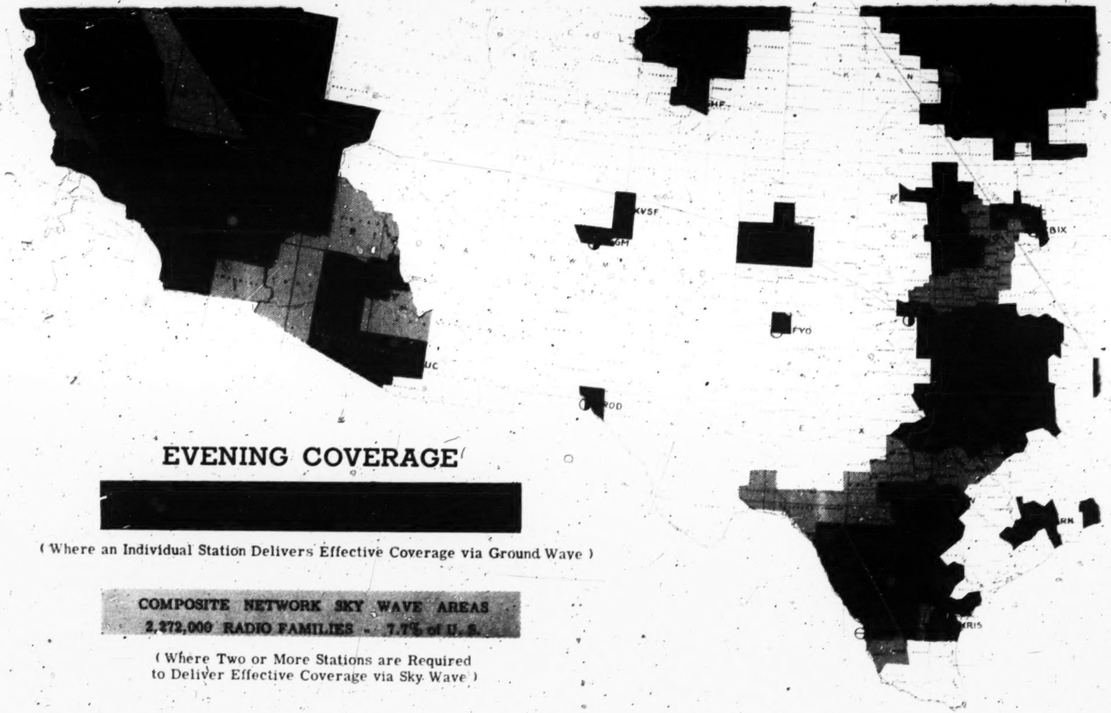
In answer to this question Mr. Fly stated:

"Yes; I think you are clear",

and then went on to a different matter.

Niles Trammell.

Subscribed and sworn to before me this 30th day of October, 1941. Florence E. Marger, Notary Public. Queens Co. No. 2625, Reg. No. 6868. Cert. filed in N. Y. Co. No. 573, Reg. No. 3-M-369. Commission Expires March 30, 1943. (Seal.)



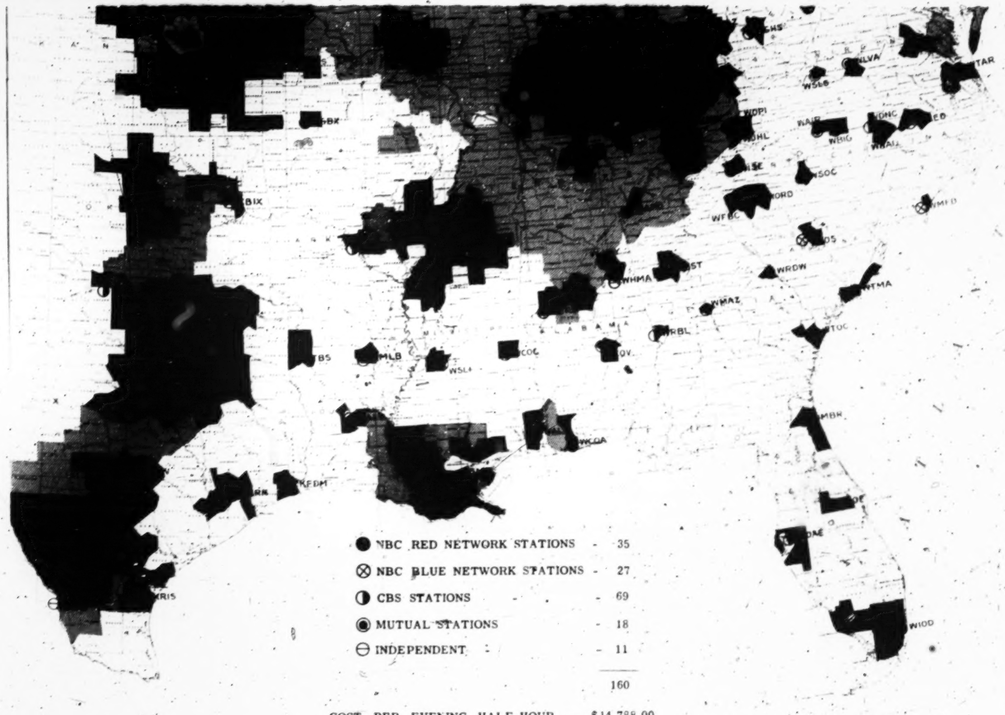
EVENING COVERAGE

(Where an Individual Station Delivers Effective Coverage via Ground Wave)

COMPOSITE NETWORK SKY WAVE AREAS
2,272,000 RADIO FAMILIES - 7.7% of U. S.

(Where Two or More Stations are Required
to Deliver Effective Coverage via Sky Wave)

Source: NBC All-County Survey of Station Listening Habits, February, 1940
Radio Family Figures Based on 1941 Estimates



NBC RED NETWORK STATIONS	35
NBC BLUE NETWORK STATIONS	27
CBS STATIONS	69
MUTUAL STATIONS	18
INDEPENDENT	11
	160

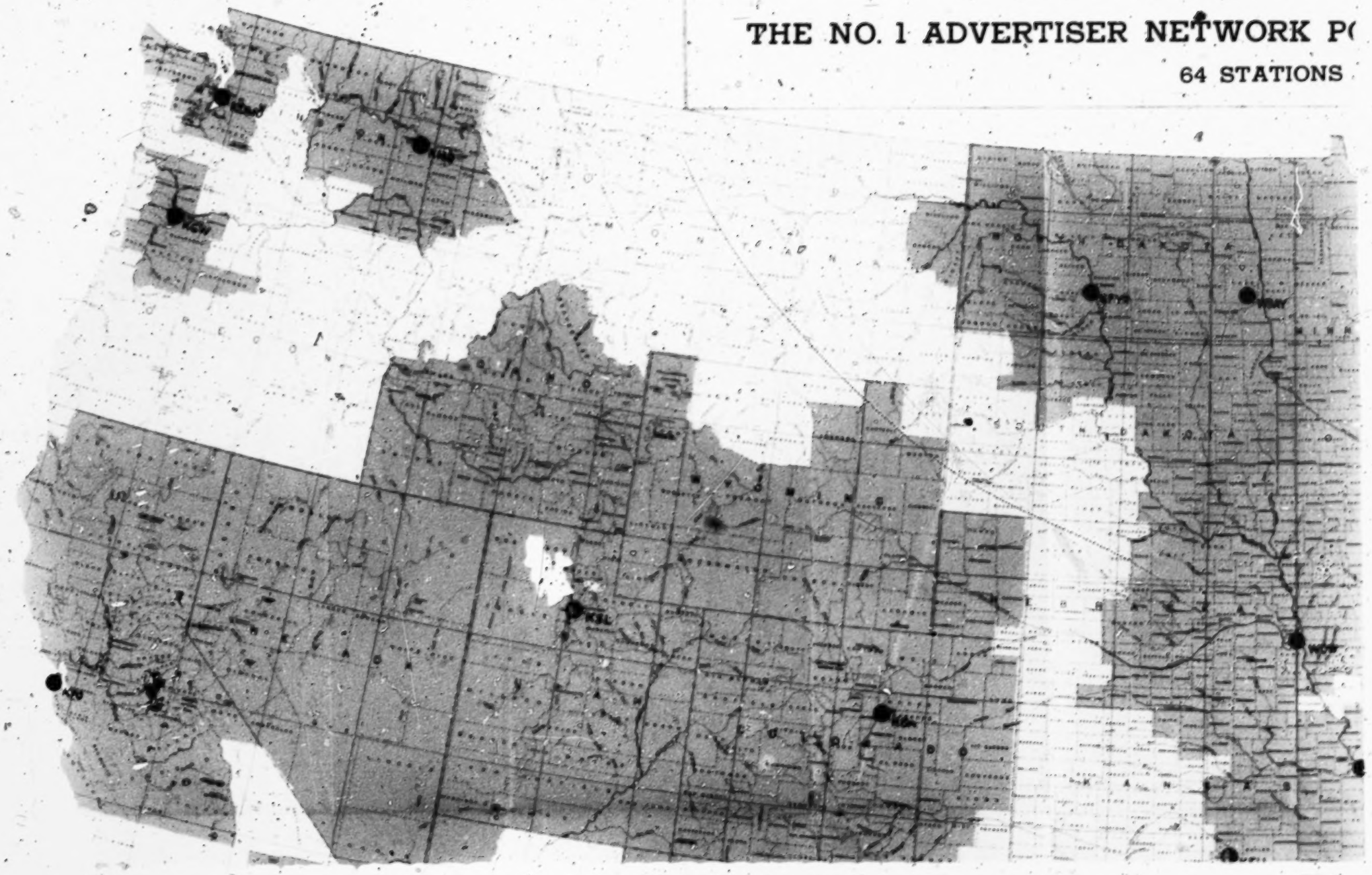
COST PER EVENING HALF-HOUR — $14,788.00

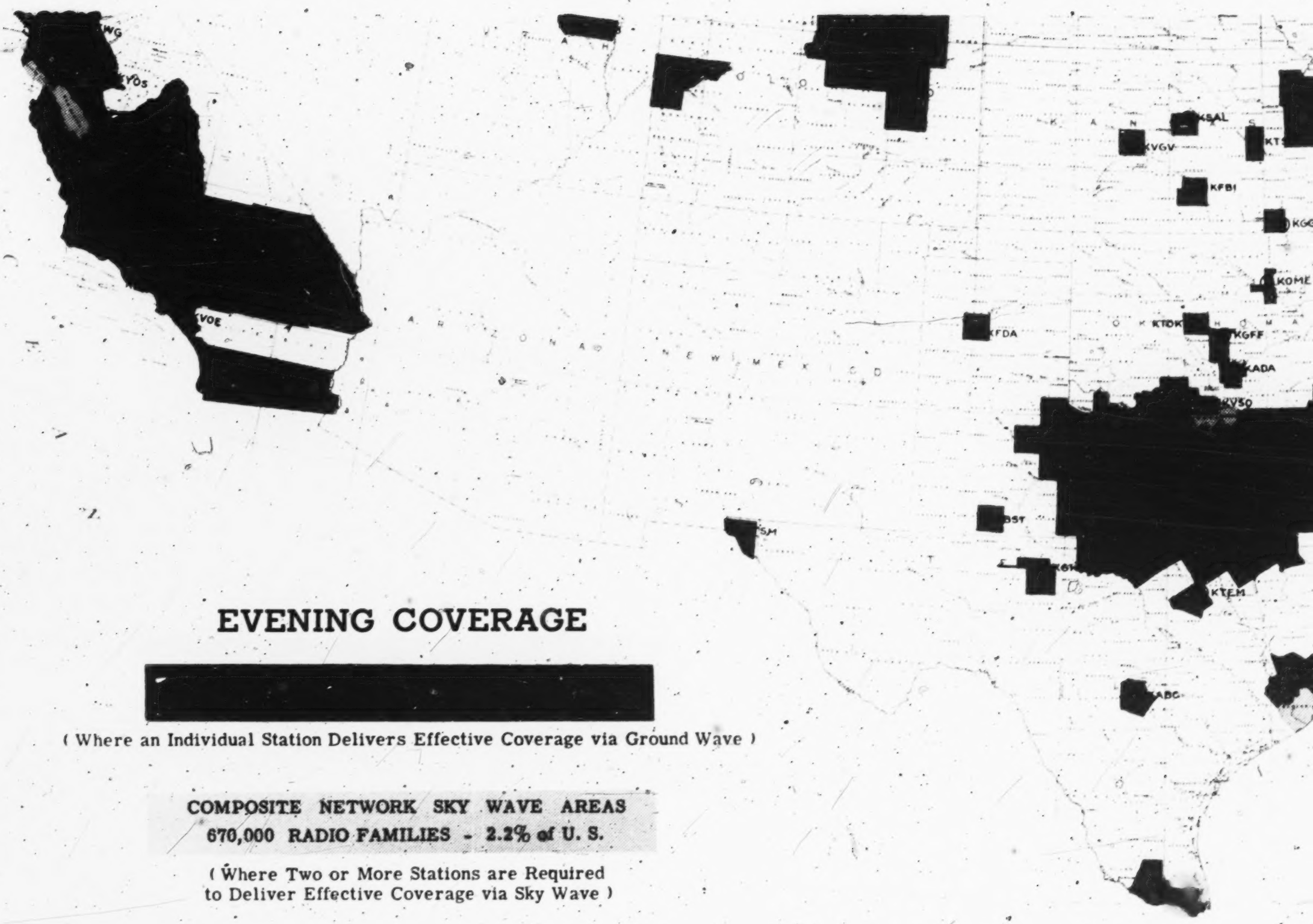
Here follow 3 maps, Exhibits I, J, K

EXHIBIT I

THE NO. 1 ADVERTISER NETWORK P(

64 STATIONS





EVENING COVERAGE

(Where an Individual Station Delivers Effective Coverage via Ground Wave)

COMPOSITE NETWORK SKY WAVE AREAS
670,000 RADIO FAMILIES - 2.2% of U. S.

(Where Two or More Stations are Required
to Deliver Effective Coverage via Sky Wave)

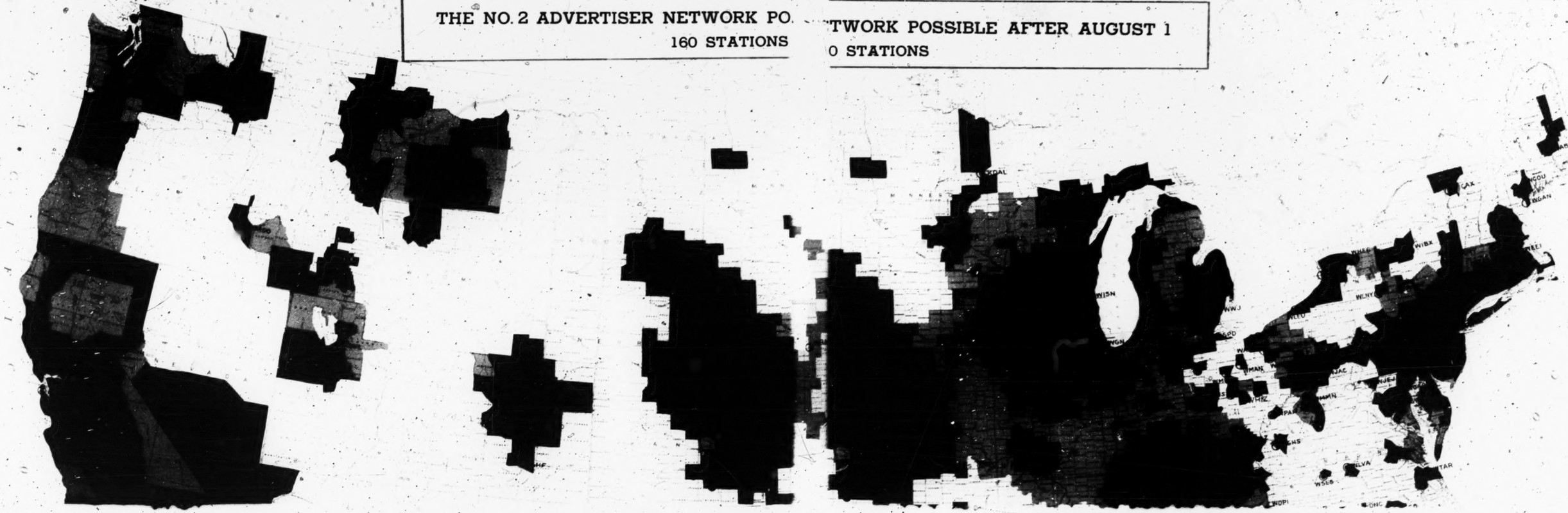
Source: NBC All-County Survey of Station Listening Habits, February, 1940
Radio Family Figures Based on 1941 Estimates

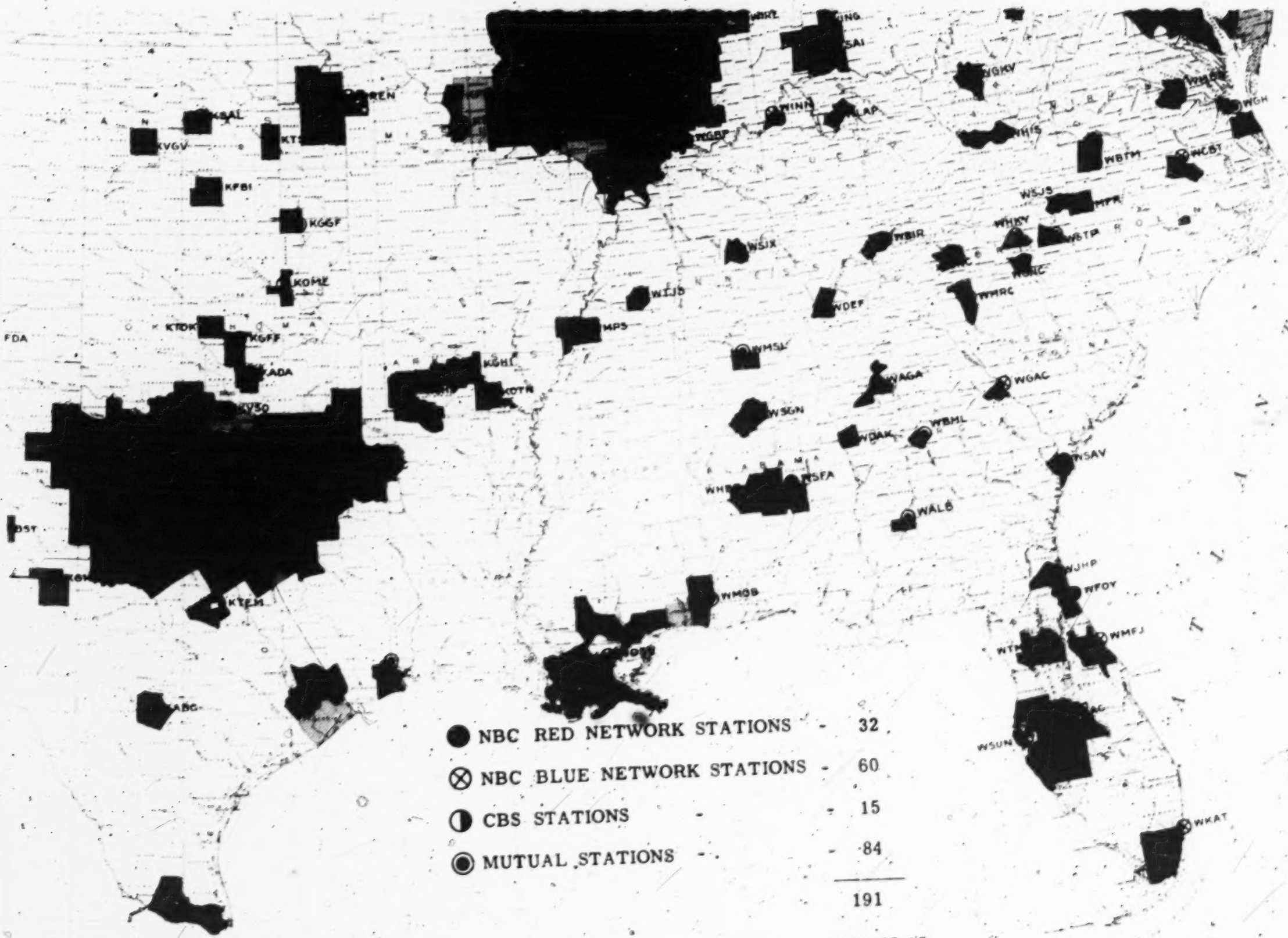
EXHIBIT J

THE NO. 2 ADVERTISER NETWORK PO
160 STATIONS

EXHIBIT J

TWORK POSSIBLE AFTER AUGUST 1
0 STATIONS





● NBC RED NETWORK STATIONS -	32
⊗ NBC BLUE NETWORK STATIONS -	60
◑ CBS STATIONS -	15
◉ MUTUAL STATIONS -	84
	191

COST PER EVENING HALF-HOUR — $12,965.18

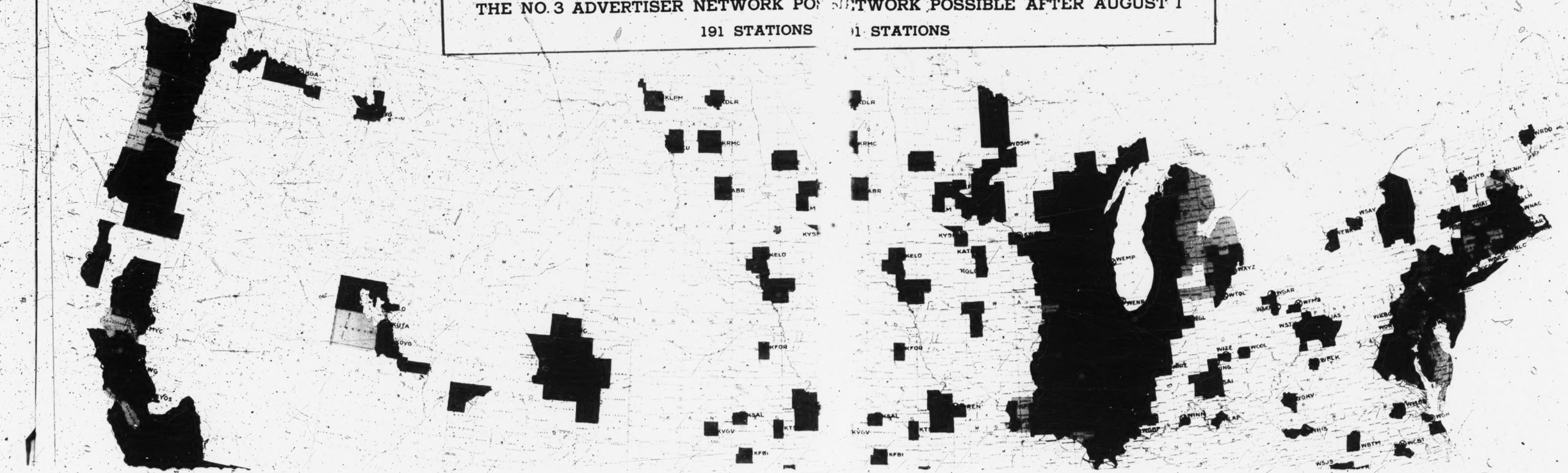
EXHIBIT K

EXHIBIT K

THE NO. 3 ADVERTISER NETWORK POSSIBLE AFTER AUGUST 1

191 STATIONS

191 STATIONS



[fol. 254] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF JOHN J. GILLIN, JR.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

John J. Gillin, Jr., being first duly sworn, deposes and says:

1. I am the General Manager of station WOW, owned by Woodmen of the World Life Insurance Society, one of the Plaintiffs herein. I have read the verified complaint herein and I am familiar with the facts therein stated and know the same to be true except as to matters stated on information and belief, and as to such matters, I believe the same to be true. This affidavit is made in support of the application of the Plaintiffs in this action for a temporary injunction and for a preliminary restraining order as prayed for in the Complaint herein.

2. The Woodmen of the World Life Insurance Society is a corporation organized and existing under the laws of the State of Nebraska, having its principal office in the City of Omaha, in said State and licensed to transact its corporate business in the States of Nebraska and New York. The Woodmen of the World Life Insurance Society owns and operates under a license from the Federal Communications Commission, and has owned and continuously operated since April 2, 1923, a standard broadcast station, known as WOW, which station is located in the City of Omaha, Nebraska. Successive renewals of the license to operate station WOW were issued to the Society by the Federal Radio Commission after its creation in 1927, and by the Federal Communications Commission since its creation in 1934, upon findings, as required by statute, that the public interest, convenience or necessity would be served thereby. The Society is now, and at all times since 1923 has been, duly qualified, legally, financially, technically and by experience and in all other respects, to operate said station WOW.

3. Said station WOW represents an investment by the Society of assets, other than good will, having a present [fol. 255] value in excess of $175,000, and said station WOW is a going concern which during its 18 years of operation by the Society has created values for the Society of over $500,000 in good will.

4. The affiant has been associated with station WOW as General Manager since 1932, and is familiar with the operations of station WOW and radio broadcasting business in general, and with the radio broadcasting and radio network broadcasting business of National Broadcasting Company, one of the Plaintiffs herein and its relationship with station WOW in particular.

5. In 1927, the Society entered into a contract with the National Broadcasting Company for the broadcasting in the area served by station WOW of the programs sent out by the National Broadcasting Company over what is known as the "Red" network of said National Broadcasting Company. From time to time, other contracts of affiliation were entered into, and station WOW has continuously operated as an affiliate of the National Broadcasting Company since that date, the present contract under which such operations are conducted being dated December 2, 1936 and running for a period of five years thereafter. Under the aforesaid contract station WOW receives and broadcasts to its audience in the area served by the station both sustaining and commercial programs transmitted by the National Broadcasting Company. In addition station WOW broadcasts programs which it originates itself.

6. Approximately half of the broadcasts of station WOW are network programs of the National Broadcasting Company transmitted to station WOW by wire. The revenue derived by station WOW from the broadcasting of network programs of NBC has consistently amounted for several years to sums in excess of $100,000 per annum.

7. During the 18 years of the operation of WOW the station has by the superiority of the programs broadcast by it acquired great popularity with a vast listening audience covering several states, reaching millions of listeners in the territory adjacent to the City of Omaha, Nebraska. The size of the audience and the popularity of the station is due largely to the high quality of the sustaining and

commercial programs received by station WOW from the [fol. 256] National Broadcasting Company transmitted through its network and broadcast by station WOW.

Without the aid of the organization and facilities of the National Broadcasting Company in furnishing high quality sustaining and commercial programs, including special events of national importance, it would be impossible for station WOW to give its listening audience the same high quality program material without great additional cost in personnel, equipment and facilities. The additional cost of providing programs of the same high quality and standard as those furnished by the National Broadcasting Company would materially impair the revenue producing ability of station WOW, and if the same high quality of the program material is not maintained, the station's popularity with its present radio audience would be materially reduced, with a resulting reduction in the value of the station as an advertising medium.

8. The Federal Communications Commission (herein referred to as the "Commission") is an administrative Commission or tribunal created by the Communications Act of 1934, approved June 19, 1934 (48 Stat. 1064; Code of Laws of United States, Title 47). On May 2, 1941, the Commission issued its original Order in Docket No. 5060 (Exhibit D to the verified complaint herein). On October 11, 1941, the Commission amended its Order in Docket No. 5060, a copy of such amendment being Exhibit E to the verified complaint herein. Said Order, as amended (hereinafter sometimes called "the Order"), is summarized in the verified complaint and the effective date of the Order is stated therein.

9. The Order of the Commission requires in effect a revision of the existing contract between the National Broadcasting Company and the Woodmen of the World Life Insurance Society, under penalty of losing its license to operate said station WOW. Affiant is informed and verily believes that the National Broadcasting Company cannot continue to supply the same high quality programs and profitably operate network broadcasting under the rules promulgated in the Order and continue to supply the same high quality of programs.

The Order places the onus on station WOW of breaching the existing contract by either failure to broadcast the

[fol. 257] network programs offered under the option time provisions of the contract or closing down the station, in violation of the express provisions of the existing contract. As a result the Woodmen of the World Life Insurance Society is in imminent danger of being subjected to a suit for damages for breach of the existing contract.

10. The revenue of station WOW, as well as of radio stations generally, is derived entirely from the sale of radio time to advertisers. The rates for radio time on station WOW, as well as on all other radio stations, are based upon the circulation that they can offer to the advertiser, that is to say on the probability that prospective customers will be listening to the programs being broadcast by the station.

The probability that a large number of prospective customers will be listening is increased if the programs broadcast by the station are of constant high quality and standard. Affiant believes that without the benefit of its contract of network affiliation with National Broadcasting Company station WOW could not broadcast programs of the high quality and diversification equal to those presently broadcast by it without incurring considerably increased expenses.

11. Affiant is informed and verily believes that the owners and operators of station WOW will suffer irreparable injury unless enforcement of the Order be restrained, in that:

A. The Society will be forced to breach the existing contract with the National Broadcasting Company with resulting danger of a suit for damages by National Broadcasting Company.

B. The Society will lose revenues from the broadcasting of commercial programs under said contract.

C. The station will be deprived of good will built up by its affiliation with the National Broadcasting Company over a period of 14 years.

John J. Gillin, Jr.

Subscribed and sworn to before me this 30th day of October, 1941. Florence E. Marger, Notary Public. Queens Co. No. 2625, Reg. No. 6868. Cert. filed in N. Y. Co. No. 573, Reg. No. 3-M-369. Commission Expires March 30, 1943. (Seal.)

[fol. 258] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF EDWARD A. HANOVER

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

EDWARD A. HANOVER, being duly sworn, deposes and says:

1. I am a Vice-President of Stromberg Carlson Telephone Manufacturing Company (hereinafter called "Stromberg Carlson"), one of the Plaintiffs herein. I am familiar with the radio broadcasting business in general and with Stromberg Carlson's radio broadcasting business in particular, and have been associated with Stromberg Carlson in the broadcasting business since its commencement of that business in 1927. I have read the verified Complaint herein and I am familiar with the facts therein stated. This affidavit is made in support of the application of the Plaintiffs herein for a temporary or interlocutory injunction and for a preliminary restraining order as prayed for in the Complaint herein.

2. Stromberg Carlson is the owner and operator of a 50,000 watt standard broadcast station located at Rochester, New York, and known as WHAM, which it has been licensed to operate since 1927. Stromberg Carlson acquired Station WHAM by purchase from the prior owner thereof, and Stromberg Carlson has been granted successive renewals of its license to operate said station both by the Federal Radio Commission since its creation in 1927 and by the Federal Communications Commission since its creation in 1934, upon findings as required by statute that the public interest, convenience and necessity would be served thereby.

3. When acquired in 1927 by Stromberg Carlson WHAM had a power of 100 watts. The power of the station was thereafter increased from time to time at considerable expense to Stromberg Carlson with the approval of the Federal regulatory authority having jurisdiction, in successive steps to the present power of 50,000 watts, which is the [fol. 259] maximum permitted by the present rules of the Federal Communications Commission.

4. Station WHAM has been affiliated with National Broadcasting Company, Inc., one of the Plaintiffs herein

(hereinafter called NBC) since 1927. During this period of time it has been affiliated with the Blue network of NBC. The terms of such affiliation are set forth in the present affiliation contract covering station WHAM between NBC and Stromberg Carlson, dated October 6, 1936, which originally ran for a period of 5 years but has subsequently been extended, on or about June 26, 1939, for an additional 5-year period so that its expiration date is now October 15, 1946. The present contract provides in general that:

(a) NBC will pay for special wirelines connecting the originating point of the program to WHAM.

(b) WHAM grants NBC an option to sell certain specified periods of the station's time, exercisable on 28 days notice, for the broadcasting of commercial programs.

(c) NBC will supply WHAM with a full schedule of sustaining programs, without monetary payment by the station or any obligation whatever upon the station to take any of said programs.

(d) As compensation for the network services rendered by NBC including sustaining programs, the assumption of wireline charges and services in selling the station's time, NBC retains a certain portion, and pays the station the balance, of the proceeds which it receives from advertisers for the sale of WHAM's time.

5. Station WHAM has a gross income from sales of its time to NBC and to local and other advertisers of approximately $500,000 per annum. It owns its transmitter located outside Rochester, New York; leases studios located in Rochester; and employs approximately 60 persons.

6. In addition to broadcasting network programs received from NBC, station WHAM is the originating point for certain sustaining programs which are transmitted by NBC over its Blue network. Among such sustaining programs which originate in Rochester and are transmitted to [fol. 260] the Blue network by WHAM are those of the Rochester Civic Music Association which has approximately 8,000 individual subscribers. The Rochester Civic Music Association supports the Rochester Philharmonic Orchestra conducted by José Iturbi and the Rochester Civic Orchestra. In addition WHAM originates programs from the Eastman School of Music, which is part of the University of Rochester. Through WHAM's affiliation with NBC the musical programs from these orchestras have been broad-

cast regularly on a nationwide basis for approximately ten years. Not only has such nationwide broadcasting been made possible by WHAM's affiliation with NBC (to the resulting benefit of the nation as a whole) but in addition such affiliation has provided a national network outlet for one of the foremost musical centers in the United States.

7. As stated in paragraph 4 above, the present contract between NBC and Stromberg Carlson covering Station WHAM grants to NBC a firm option to sell certain specified periods of the station's time on 28 days notice. The above mentioned Order prohibits the inclusion of such an optional time provision in any contract between a network organization and a standard broadcast station. Because of said contract with WHAM containing provisions for such optional time, and similar contracts with other stations, NBC is in a position to sell time to advertisers on a national network, *as such*. If an option exercisable as against another network organization or exercisable on less than 56 days notice is prohibited it will be practically impossible to sell time to advertisers on a network basis, *as such*. As a result WHAM will receive less revenue under its affiliation contract with NBC. For the year 1940 the income of Station WHAM was derived approximately one-half from the sale of network time by NBC.

8. In 1941 there has been a substantial increase both in the amount of network time sold to NBC and the amount of time sold to local and other advertisers. Even with an increase in the sales to NBC, Station WHAM has been fully able to serve its local community in local advertising and in the broadcasting of all events of local interest. Sale of time to NBC and optional provisions of the contract have been equally beneficial to both the national and the local service of WHAM.

[fol. 261] 9. The receipt of high quality network programs from NBC has contributed substantially to the growth of WHAM's radio audience and this is reflected in the desirability of WHAM as an advertising medium. Stromberg Carlson estimates that the price at which it would be able to sell time to advertisers without network affiliation would be approximately one-half of the price which it currently receives.

10. The present license of Station WHAM expires on February 1, 1942. The Order does not by its terms require

the immediate modification of existing contracts. The Order simply provides that a license will not be granted if contracts are in force which contain provisions such as are set forth in the existing contracts between NBC and Stromberg Carlson. However, the Chairman of the Commission has stated at hearings before the Senate Committee on Interstate Commerce that operation of a station under an affiliation contract containing provisions which are prohibited by the Order is not an operation which is in the public interest. Furthermore the Chairman of the Commission also stated at such hearings that the Commission will issue an order revoking the license of any station which retains an affiliation contract containing provisions which are forbidden by the Order.

11. Cancellation of the affiliation contract with NBC will disturb an association which has existed for fourteen years and will inflict irreparable loss upon Stromberg Carlson. Furthermore, cancellation of the contract without the consent of NBC may result in suit by NBC against Stromberg Carlson for breach of contract. The Order places the burden on Stromberg Carlson of complying with the Order, which will cause irreparable damage to Stromberg Carlson through loss of revenue (and which may in addition subject it to damages for breach of contract) or, in the alternative, of not complying with the Order which may result in the loss of its license for Station WHAM.

Edward A. Hayover.

Subscribed and sworn to before me this 30th day of October, 1941. Florence E. Marger, Notary Public. Queens Co. No. 2625, Reg. No. 6868. Cert. filed in N. Y. Co. No. 573, Reg. No. 3-M-369. Commission expires March 30, 1943. (Seal.)

[fol. 262] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF TELFORD TAYLOR IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

DISTRICT OF COLUMBIA, ss:

Telford Taylor being duly sworn says:

(1) That he is the General Counsel of the Federal Communications Commission and as such is familiar with the

Commission's proceedings taken under Order No. 37, Docket No. 5060.

(2) The said proceedings are as set forth in affiant's affidavit annexed to defendants' Motions to Dismiss the Complaint, or in the Alternative, for Summary Judgment, dated November 5, 1941.

(3) A certified copy of said proceedings has heretofore been filed with this Court in conjunction with defendants' Motions to Dismiss the Complaint, or in the Alternative, for Summary Judgment. It is incorporated herein by reference as Exhibit A.

(4) Affiant submits that Exhibit A is relevant on the issues sought to be raised by plaintiff's Motion for Preliminary Injunction and shows that said Motion should not be granted.

(Signed) Telford Taylor.

Subscribed to and sworn before me this — day of December, 1941. Duly acknowledged. ——— ———, Notary Public.

[fol. 263] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRED WEBER, GENERAL MANAGER OF MUTUAL BROADCASTING SYSTEM, INC., in Opposition to Motion for Preliminary Injunction

STATE OF NEW YORK,
County of New York, ss:

Fred Weber, first being duly sworn, on oath deposes and says:

I

Affiant

Affiant is, and since the organization of Mutual in the fall of 1934 has been, in the employ of Mutual Broadcasting System, Inc. (herein referred to as "Mutual"), with the title of coordinator until 1936, and since then with the title

of general manager. Affiant is, and since the outset has been, a member of the Board of Directors of Mutual. Subject to the authority of the Board of Directors and the corporate officers of Mutual, none of whom (except the auditor) is paid any salary or other compensation by Mutual, affiant has at all times been, and is, the principal executive officer of Mutual, with active duties ranging over the entire field of Mutual's activities and operations. From 1926 to 1933 affiant was in the employ of plaintiff, National Broadcasting Company, Inc., serving successively in the commercial engineering, stations relations, and sales departments of that company. In 1933 affiant became vice-president and general manager of American Broadcasting System, a company which was organized in that year and which for a period of six months attempted without success to operate a national network. By reason of his past and present experience and duties, affiant is thoroughly familiar with the business of network broadcasting, embracing, and with particular reference to, its competitive aspects, including [fol. 264] present and past efforts, practices, and policies of the several national network organizations, in competing with each other in the sale of time to advertising agencies, advertisers, and others, and in securing desirable independently-owned broadcasting stations located in cities throughout the United States and elsewhere in North America to serve as network affiliates and as outlets for the broadcasting of network programs. Affiant appeared as a witness in behalf of Mutual in the proceedings before the Commission now under review (see transcript of record, pages 5116-5230 and 8249-8298) and actively participated in the preparation of exhibits and generally of Mutual's presentation before the Commission. Affiant also testified in behalf of Mutual at the hearing before the Senate Committee on Interstate Commerce on the so-called White Resolution (S. Res. 113) in June, 1941, on the subject-matter of the Commission's order now before this Court. Affiant has read and is familiar with the contents of the affidavits of Niles Trammell, William S. Paley and others heretofore filed with this Court in support of the motions of plaintiffs National Brodcasting Company, Inc., and Columbia Broadcasting System, Inc. (hereinafter referred to as National and Columbia) for temporary injunction and temporary restraining order, and makes this affidavit in opposition to said motions.

II

Mutual Broadcasting System, Inc.

1. *Corporate organization.* Mutual is an Illinois corporation organized October 29, 1934, with its principal office in Chicago, Illinois. The facts with respect to its history, business, and corporate organization from the date of its incorporation are correctly set forth in the Commission's Report on Chain Broadcasting of May 2, 1941 (at pages 26 to 28) as of that date. Mutual has outstanding a total of 99 shares of common stock (out of an authorized total of 500 shares of common stock, there being no other class of stock), held by seven stockholders, each of whom (with the exception of Colonial, noted below) directly owns and operates one or more broadcast stations, and two of whom (Colonial and Don Lee) operate regional networks, as follows:

[fol. 265]

Shareholder	Number of Shares	Call Letters of Station or Stations	Location of Station
WGN, Inc.	25	WGN	Chicago, Ill.
Bamberger Broadcasting Service, Inc.	25	WOR	New York, N. Y.
Don Lee Broadcasting Co.	25	KHJ	Los Angeles, Cal.
		KFRC	San Francisco, Cal.
		KGB	San Diego, Cal.
		KDB	Santa Barbara, Cal.
Colonial Network, Inc.*	6	WAAB	Boston, Mass.
		WNAC	Boston, Mass.
		WEAN	Providence, R. I.
		WICC	Bridgeport, Conn.
United Broadcasting Co.	6	WHK	Cleveland, O.
		WCLE	Cleveland, O.
		WHKC	Columbus, O.
Cincinnati Times-Star Co.	6	WKRC	Cincinnati, O.
Western Ontario Broadcasting Co., Ltd.	6	CKLW	Windsor, Canada (in the Detroit area)

* Colonial Network, Inc., is not the licensee of the four stations set opposite its name. The licensee of these stations is Yankee Network, Inc., a corporation owned by the same interests.

Steps have been taken as a result of which one or more of four of the foregoing (Colonial, United, Western Ontario, and Cincinnati Times-Star) may have their shareholdings increased from 6 shares to 25 shares each (the matter being at present in process of negotiation and study), and four other concerns will or may be added to the list of shareholders, with either 6 shares or 25 shares each, owning

and operating broadcast stations affiliated with Mutual as follows:

Prospective Shareholder	Call Letters of Station or Stations	Location of Station
Pennsylvania Broadcasting Co	WIP	Philadelphia, Pa.
WCAE, Inc	WCAE	Pittsburgh, Pa.
Baltimore Radio Show, Inc	WFBR	Baltimore, Md.
Buffalo Broadcasting Corporation	WGR	Buffalo, N. Y.

Mutual has a Board of Directors with nine members, based on representation of the shareholders in proportion to their shareholdings, and also including affiant. Pursuant to its cooperative purposes and character, and to insure a fair representation of the interests and points of view of its shareholders and affiliates, as well as of the various communities and sections of the United States, Mutual, in addition to the representation of its shareholders on its Board of Directors, maintains an Operating Board composed of rep- [fol. 266] resentatives of all its present and prospective shareholders and also two representatives of affiliates other than shareholders.

2. *Sources of revenue.* Mutual's expenses of operation are met through funds derived (a) from commissions retained by Mutual out of sums received from advertisers and others for use of time over the stations constituting the Mutual network, together with specific contributions from shareholders and affiliates for wire-line expenses, and (b) from contributions from Mutual's shareholders fixed in accordance with contracts between them and Mutual.

III

Mutual Network Operations

1. *General scope and character.* Like its older competitors, National and Columbia, Mutual is engaged in the operation, and in performing all the functions, of a national network organization, both within the definition accepted by the Commission in its Report and within the definition generally accepted in the industry and according to popular usage. Like said competitors, Mutual is engaged in supplying a daily network program service consisting of both commercial and sustaining programs, totalling over 112 hours a week over a system of telephone wire-lines to broadcast stations scattered over a large part of the United

States. In addition, this program service is supplied continuously to one station in Canada, is made available, and to a substantial extent is used by, many other stations in Canada, and in part, is supplied to stations in Hawaii by radio.

2. *Broadcast stations affiliated with Mutual.* Beginning in the fall of 1934 with an association of four broadcast stations located in New York, Chicago, Detroit, and Cincinnati, and expanding by gradual steps into a network of national scope and character, Mutual now has (as of November 1, 1941) a total of 190 broadcast stations in the United States, Canada, Alaska and Hawaii. A correct list of these stations, together with data as to the power, frequency and hours of operation of the stations, the cities in which they are located and the population thereof, and their primary affiliations, if any, with National and Columbia, appears in [fol. 267] Appendix A, attached hereto. This total includes stations owned by its shareholders, stations affiliated with certain regional networks which in turn are either shareholders of Mutual or are affiliated with it, and other independently-owned stations not falling within either classification. While the list of affiliated stations appears large, actually, in terms of effective use as outlets for network programs, the network is under severe handicaps. These are due primarily to the fact that, as hereafter more fully appears, the restrictive provisions in the contracts between National and Columbia, condemned in the Commission's Report and forbidden by the Regulations now under review, completely bar Mutual from many important cities and markets, and entirely or largely bar Mutual during the more desirable broadcasting hours from many other important cities and markets, or make Mutual's access thereto subject to such conditions and uncertainties as to burden it with a heavy competitive disadvantage. In addition, as appears in Appendix A, Mutual's list of affiliated stations contains relatively few stations of high or medium power with large coverage; it is largely made up of stations of low power and limited coverage. Many of them are in smaller cities which Mutual's competitors have passed over. In a number of instances groups of several such stations are necessary to furnish coverage even partially approaching that of single stations of larger power affiliated with either of said competitors. Appendix B, attached hereto, contains

a comparison of the stations affiliated with each of the four national networks in these respects.

3. *Wire-lines for transmission of network programs.* Like its said competitors, Mutual maintains an extensive and virtually nationwide system of telephone wire-lines suitable and continuously available for the transmission of network programs from the places of origination to the stations constituting the network, the total mileage of said circuits being approximately 15,000 miles, at an annual cost of $1,200,000. These wire-lines are, for the most part, leased directly from the telephone company by Mutual but, in some instances, are secured by virtue of arrangements between Mutual and certain of its shareholders and affiliates who, in turn, lease the wire-lines from the telephone company. Mutual's wire-line system compares favorably with the wire-line systems of National and Columbia in [fol. 268] mileage and costs [1] and, to the extent that it is less, it is due somewhat to the fact that Mutual is a younger network but more to the effect of the restrictive provisions in the National and Columbia contracts barring Mutual from many communities and regions. In addition to its regular wire-line system, whenever necessary or desirable, Mutual arranges for additional circuits on a temporary basis to supply to the network programs originating at points not on the network, and similarly for transmission by radio or wire to the United States of programs originating in foreign countries for use over its network.

4. *Mutual's network program service—general.* Like its said competitors, Mutual supplies a network program service, consisting of both commercial and sustaining programs, to its affiliated stations. This service averages not less than 16 hours daily or a total of over 112 hours weekly. Frequently, addional hours of program service are supplied, including, on some occasions, service throughout the entire 24 hours of the day for the covering of events of

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[1] According to Trammell's affidavit, page 13, "NBC's wireline expenses in 1940 aggregated in excess of $3,600,000" for *two* national networks. According to Paley's affidavit, page 9, the cost is "over $2,000,000 a year." Both these figures apparently include the cost of special, local occasional or temporary lines in addition to those used regularly as part of the network systems.

major importance. The network program service thus supplied by Mutual is substantially the same in continuous character, content, quantity, quality, and expense of production as the network program services supplied by National and Columbia to their respective affiliates, differing only as (but not to the extent that) would be naturally expected of a younger organization having a smaller volume of business and suffering from the competitive handicaps imposed by National and Columbia's restrictive contracts.

5. *Commercial network programs.* Like its said competitors Mutual is engaged in selling time on the stations constituting its network to advertisers, usually through advertising agencies (in most instances through a sales organization maintained by mutual but, in some instances, through sales organizations maintained by its shareholders [fol. 269] or affiliates), for commercial network programs, to be supplied over the Mutual telephone wire-line circuits to as many of the stations as the advertiser can be persuaded to pay for. Because Mutual is a younger network, and more particularly because of the obstacles created by National's and Columbia's restrictive contracts, Mutual has not been able to, and does not provide, as great a volume of commercial network programs to its affiliated stations as do its said competitors, but there is otherwise no substantial difference in the commercial network program service supplied by Mutual and that supplied by its said competitors. As is the case with the latter, and in substantially the same manner, most of Mutual's commercial network programs are largely produced and paid for by the advertising agency and not by the network organization. Those not so produced are, in the case of Mutual, produced principally at the stations and by the staffs and facilities of Mutual's shareholders, chiefly at New York, Chicago, and Los Angeles, in substantially the same manner, and with the same results, quality, and effects, as those produced at the so-called key stations of said competitors.

6. *Sustaining network programs.* Like its said competitors, Mutual is engaged in supplying a sustaining program service to its affiliated stations during hours not occupied by commercial network programs. This sustaining program service exceeds 84 hours weekly and consists, in general, of the same character of cultural, educational, religious and public service programs as those supplied by its said

competitors, and differs only in that (1) because of its smaller volume of commercial network programs, Mutual furnishes a greater volume of sustaining network programs in terms of hours per week than do its competitors, and (2) because, with certain exceptions (consisting principally of broadcasts of news and special events originating in foreign countries), such sustaining programs are produced not by Mutual as a corporate entity but by its shareholders and affiliates, principally those at New York, Chicago, and Los Angeles, but also, to a substantial extent, by its shareholders and affiliates elsewhere. The selection of sustaining programs to be supplied to the network is made by Mutual through a competent staff by choosing the best from all such programs broadcast or proposed to be broadcast by its shareholders and affiliates. The actual annual cost [fol. 270] of production of such sustaining programs compares favorably with the sustaining program costs of National and Columbia.[2] In the production of sustaining programs, the studios, staffs and equipment of Mutual's principal shareholders serve substantially the same purposes and perform substantially the same functions as the so-called key stations of its competitors.[3] The Mutual method of supplying sustaining programs has several recognized and demonstrated advantages in that (1) it encourages shareholders and affiliates, with stations in many

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[2] According to Trammell's affidavit, page 15, National's *two* national networks, the Red and the Blue, "required the expenditure of more than $3,000,000 for talent and material alone." According to Paley's affidavit (p. 10) "In 1940 alone, CBS expended in excess of $5,000,000 on sustaining programs." This latter figure, however, includes an arbitrary allocation of Columbia's overhead, administrative expenses, wire-line rentals, etc. The cost of producing simply those of Mutual's sustaining programs (in terms of talent and material alone) which originate at WOR, New York, WGN, Chicago, and KHJ, Los Angeles, exceeds $1,250,000 annually and, when the cost of sustaining programs at other points is added, substantially exceeds this figure.

[3] It is to be noted that at one of the principal points of program production, Los Angeles, National does not own or operate any station.

parts of the country, to produce good sustaining programs in the expectation that they will be accepted on the network and broadcast to a nation-wide audience, with appropriate credit in each instance to the station and the locality originating the program; instead of having the function of providing sustaining programs appropriated entirely by the network organizations,[4] (2) through the Mutual system of compensation to stations hereinafter described, funds are provided to shareholders and affiliates for this purpose instead of being retained by the network corporation,[5] (3) the [fol. 271] public is provided with a highly desirable diversity of points of program origination, and (4) the tendency toward undue concentration of talent and facilities for the production of programs in two or three large cities is materially neutralized. The excellent and varied character of Mutual's sustaining program service, provided in this manner, appears from the listings of regular sustaining features supplied over its networks and by the fact that in several instances where a station is or has been affiliated with both National's Blue Network and the Mutual network, the affiliate has frequently taken more hours of the Mutual sustaining service than it has of National's sustaining service. Statements and insinuations disparaging either the quantity or quality of this service, such as those appearing in Mr. Paley's affidavit (at pages 6-8, 29-30) and Mr. Trammell's affidavit (at page 7), are simply contrary to well-known or easily ascertainable facts.

7. Ownership of stations, studio facilities, etc. Unlike its said competitors, Mutual, as such, does not own or operate any broadcast station. As appears from what has already been stated, however, the broadcast stations of certain of its shareholders, principally those in New York, Chicago, and Los Angeles, but to some extent also the broadcast stations of the other shareholders and of certain of Mutual's affiliates (including its affiliate WOL at Washington, D. C.) serve substantially the same purposes and

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[4] Mutual's programs originate at an average of not less than 18 different cities each week (Transcript of Record p. 5267).

[5] As stated in Paley's affidavit (p. 5), "The quality of sustaining programs can be improved by the individual station when its revenues from advertising increase."

perform substantially the same functions as the so-called key stations of National and Columbia,[6] so far as they are either necessary or desirable for successful network operation. The stations which serve such purposes for Mutual have elaborate studios in buildings specially built or [fol. 272] adapted for the purpose, maintain competent engineering staffs, and maintain ample facilities for the production of programs, which compare favorably to those of National's and Columbia's so-called key stations, and, in some instances and in some respects, are superior thereto. Charges such as those made in Mr. Paley's affidavit (pp. 7-8, 30), that

"Mutual has no studios, maintains no engineering department, neither owns nor maintains any facilities for the production of programs and does not originate or produce a network program service such as is maintained by CBS and NBC"

apply only to Mutual as a separate corporate entity and are distinctly untrue of Mutual in its operation as a network.

8. *Basis of compensation to stations.* Unlike its competitors, Mutual has not attempted, and does not attempt, to fix, by contract or otherwise, the rates to be charged advertisers and others for the use of time over stations constituting its network. The rates charged by Mutual are simply the sum total of the rates of the stations used, save only in the case of certain volume discounts, but even in such case the discounts are also based on the stations' rates. Of the sums received from advertisers and others, Mutual retains a commission determined in advance by

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[6] It is to be noted, for example, that National does not own or operate a station at one of the principal production points, i. e., Los Angeles, and that National and Columbia each own and operate stations at cities in which the other does not own or operate a station (e. g., at Cleveland, St. Louis, Minneapolis, Charlotte, Denver, and San Francisco). It is to be also noted that, at each of their stations, including the so-called key stations, both National and Columbia sell substantial amounts of time for local or national spot commercial programs and, in the periods thus sold, do not broadcast their excellent sustaining programs.

contract between it and the affiliate, which in the normal case is either large enough to include, or is supplemented by, the affiliate's share of the cost of wire-lines to connect it with the Mutual system, and, in the case of shareholders, Mutual also retains each shareholder's agreed contribution toward its expenses of operation. Because of this basis of compensation, Mutual, on the whole, pays to its affiliates a larger proportion of the sums received from advertisers for the use of the affiliates' stations than is paid by National and Columbia, although, because of its smaller total volume of business, the actual total sum paid to its affiliates is, in most instances, less.

9. *Mutual's contracts with affiliates.* Prior to February 1, 1940, Mutual's contracts with its affiliates (with the exception of a network exclusivity provision with one shareholder and territorial exclusivity provisions with the same shareholder and a few affiliates) did not contain provisions [fol. 273] contravening the Commission's Regulations, either in their original form as adopted May 2, 1941, or as amended October 11, 1941. Since February 1, 1940, as is more particularly set forth in the Commission's Report (see particularly pages 35-37) and for the reasons therein stated, Mutual's contracts with its shareholders, its prospective shareholders, and one or two of its other affiliates have contained provisions of exclusivity and of exclusive time-options (from 3¼ to 4¼ specified hours on week days and 6 hours on Sundays) which contravene said Regulations, but the contracts provide that these clauses shall lapse if the Commission prohibits them, or if the other national networks voluntarily abandon them and, at the time the contracts were entered into, Mutual advised the Commission of the fact, of the reasons therefor, and of its willingness and desire to abandon them in the event such Regulations should be adopted. Immediately after the Commission's order of May 2, 1941, Mutual prepared a contract to conform with the Regulations in their original form and, on submission thereof to the Commission, secured the Commission's informal approval on June 19, 1941. A copy of this contract appears in the printed Hearings on S. Res. 113 at pages 565-9. Had it not been for the delays thereafter in putting the Regulations into effect, this contract would have been forthwith submitted by Mutual to all its shareholders and affiliates and, as affiant is informed

and believes, would have been executed by them and would now be in full force and effect. Among the provisions of the contract, thus informally approved by the Commission, were the following:

"2. Mutual and the Broadcaster will each publicize the Station as the regular Mutual outlet in the city in which the station is located. The station shall have the right to the first call on Mutual network commercial and sustaining programs in said city and Mutual shall not offer any series of programs or single program (not a part of a series) to any other radio station located in said city unless said series of programs or single program has been offered to the Broadcaster for broadcasting through the Station under this contract and the Broadcaster shall have failed or refused to accept such program or programs within forty-eight (48) hours after Mutual's offer. In the case of a [fol. 274] commercial program or a series of commercial programs:

"(a) If the Broadcaster is unable to clear the required period or periods of time on the station for such program or programs but notifies Mutual within said 48 hours that the Broadcaster can clear a mutually satisfactory substitute period or periods and is able and willing to broadcast the program or programs by means of the off-the-line recordings (made by the Broadcaster without cost to Mutual or the advertiser) during such substitute period or periods. Mutual will accept such substitute period or periods, unless the advertiser is unwilling to accept such broadcasting by the Station by means of off-the-line recordings during such substitute period or periods, it being understood that Mutual is not obligated to require the advertiser to accept such delayed broadcasting; and

"(b) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs scheduled to run for 13 weeks or more, or a series of separable programs, but notifies Mutual within said 48 hours that the Broadcaster will clear said periods of time upon a specified date not later than four (4) weeks after the commencement of the series of programs, Mutual will contract for such periods of time on the Station as of the specified date upon which the Broadcaster is able to clear such periods, unless the advertiser refuses to accept such postponement of broadcasting on the station.

"If the Broadcaster fails or refuses to accept said program or programs or if the Broadcaster is unable to clear the required period or periods of time and Mutual is unable to persuade the advertiser to use a substitute period or periods or to postpone the commencement of such programs on the Station, as provided in the preceding subparagraph, Mutual may contract with any other station located in said city for the broadcasting of said commercial program or programs. In the case of a single sustaining program or series of sustaining programs:

"(a) If the Broadcaster is unable to clear the required period or periods of time for such program or programs but notifies Mutual that the Broadcaster will broadcast the program or programs by transcription at a mutually satisfactory substitute period or periods, Mutual will not offer [fol. 275] said program or programs to any other station in said city; and

"(b) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs, Mutual, in offering said series of programs to any other station in said city, will offer said series subject to recapture by the Station on one (1) week's notice to Mutual. It is understood, however, that notwithstanding the foregoing, Mutual may make available to any other station in said city special sustaining programs of great public importance (such as, but not limited to, addresses of the President of the United States.)"

On October 31, 1941, affiant sent to each of Mutual's shareholders and prospective shareholders a letter, a copy of which is attached hereto as Appendix C, and an informal interim agreement, a copy of which is attached hereto as Appendix D. The last-mentioned agreement was assented to by all of its said shareholders and prospective shareholders and Mutual is now operating thereunder without experiencing any difficulty or inconvenience by reason of any provision based on, or required by, the Regulations. Shortly thereafter, Mutual completed preparation of another contract to conform to the amended Regulations of October 11, 1941, a copy of which is attached hereto as Appendix E. Had it not been for subsequent delays in the effective date of the amended Regulations, due to the motions of plaintiffs now under consideration and to the stip-

ulation between plaintiffs and the Commission, this contract would already have been submitted to Mutual's shareholders and affiliates and, as affiant is informed and believes, would have been executed by them and would now be in full force and effect.

IV

Mutual's Attempts to Secure Interim Relief in the Proceedings Before the Commission

1. *Initiation of the proceedings.* As stated in the Commission's Report (page 1), the proceedings before the Commission commenced with the Commission's Order No. 37, adopted March 18, 1938. Neither Mutual, nor, so far as is known to affiant, any officer, employee or representative of Mutual had made any complaint to the Commission on the [fol. 276] subject-matter of the proceedings, or had taken any step which led or had any part in leading the Commission to initiate the proceedings.

2. *Participation in the hearing.* As was the case of its competitors, pursuant to notice by, and request from, the Commission, Mutual entered its appearance and thereafter presented evidence before the Committee in charge of the hearing. Its witnesses (including affiant), to the best of their ability, produced the facts and information called for by the Commission's notice or requested by its counsel. The evidence presented in behalf of Mutual appears principally at pages 4845 to 5428 (February 7 to 14, 1939) and pages 8249 to 8298 (April 18, 1939) of the transcript of record, and in Exhibits Nos. 368 to 435. The hearing extended from November 14, 1938 to May 19, 1939.

3. *Mutual's motion of April 19, 1939.* The injuries to Mutual and its affiliated stations resulting from the restrictive contracts of National and Columbia having steadily persisted and increased during the course of the hearing, and the threatened future injuries appearing likely to become greatly aggravated through the increasing activities of National and Columbia (both of which organizations were, in apparent defiance and attempted nullification of the Commission's power and jurisdiction, busily engaged in attempting to secure long-term renewals of their restrictive contracts with affiliates), Mutual, on April 19, 1939, sought

interim relief from the Commission through a motion the nature of which, and the arguments presented in support and in opposition, appear at pages 8454-8463 of the transcript of record. In substance, the motion sought the immediate adoption by the Commission of a regulation which would have forbidden licensees to enter into affiliation contracts with network organizations, or into any renewal or extension of existing affiliation contracts, for a period extending beyond December 31, 1940, at least in cities having less than four stations with comparable facilities (R. 8457, 8459). The motion was taken under advisement by the Committee (R. 8463).

4. *Renewal of the motion in July, 1939.* No action having been taken on said motion, on July 6, 1939 Mutual filed a formal motion in writing asking that the Committee recommend to the Commission at an early date the adoption of a regulation in substance as follows:

[fol. 277] "No licensee of a standard broadcast station shall enter into a contract, agreement or other arrangement with any network organization covering or dealing with the affiliation of such licensee's station with the network organization, or into any renewal or extension of any such existing contract, agreement or other arrangement, or exercise any option or other privilege contained in any such existing contract, agreement, or other arrangement for renewal or extension thereof, for a period extending beyond * * *",

suggesting that the date to be specified in the foregoing be such as to allow sufficient time for the conclusion of the proceedings and the issuance of such regulations as might result therefrom. On July 14, 1939, Mutual filed a supplement to said motion incorporating facts and events occurring since the filing of the motion. As appears in greater detail in said motion and supplement as contained in the record, National was in the process of obtaining, and did obtain, an exclusive and time-option contract with respect to WLW, a 50 kw. clear channel station which had theretofore been free of such restrictions and had been Mutual's affiliate in Cincinnati and one of its basic and most important outlets. Mutual was thereafter completely excluded from said station. The contract was secured by National, as affiant is informed and believes, with the primary intent

and purpose of crippling Mutual as a competitor [7] by depriving it of access to one of its most important outlets. No action on said motion or supplement was taken by either the Committee or the Commission.

5. *Renewal of the motion on July 17, 1940.* The Committee having made its report to the Commission on June 12, 1940, and the injuries to Mutual resulting from the restrictive contracts having persisted and increased, Mutual renewed its motion formally and in writing on July 17, 1940, as appears more fully from the record. No action, however, was taken by the Commission on the motion further than to announce in a release issued July 26, 1940 that the [fol. 278] advisability of adopting the temporary regulation requested by Mutual was one of the subjects to which briefs should be directed. No temporary or interim relief having been granted to Mutual, the Commission on May 2, 1941, over 3 years after initiating the proceedings, adopted the Regulations which, as later amended on October 11, 1941, are now sought to be further delayed from going into force and effect.

V

Irreparable Injury to Mutual Through Maintenance of Restrictive Contracts

1. *The contract provisions involved.* The provisions in contracts between National and Columbia and their respective affiliates which have caused, are now causing, and will cause great and, affiant believes, irreparable injury to Mutual are those forbidden by Regulations 3.101 and 3.104 of the Commission, as amended, and, to an incidental but nonetheless important extent, those forbidden by Regulation 3.103. These contract provisions, generally described, consist in

a) provisions by which the affiliate agrees not to broadcast the programs of any other network organization; [8]

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[7] Thereafter, after sale by Columbia of a station (WKRC), theretofore owned and operated by it in Cincinnati, to Cincinnati Times-Star Co., Mutual obtained an outlet in that city.

[8] Such provisions are contained in virtually all contracts between Columbia and its affiliates and, at least until recently, have been contained in contracts between National

b) provisions by which the affiliate grants to the network organization an exclusive option, exercisable on 28 days' [fol. 279] notice, either on all its hours of operation,[9] or on its more desirable hours in the morning, afternoon, and evening periods;[10] and

c) provisions by which the term of such contracts is fixed at a period of 5 years or more.[11]

In addition, the ownership by National and Columbia of broadcast stations in certain communities, more particularly in two communities served by less than four full-

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and some 35 of its affiliates. From the fact, however, that all mention of the exclusivity clause is omitted from National's complaint (see par. 21 at p. 7 of the Complaint), that the form of affiliation contract attached to the Complaint as Exhibit A contains no such clause, and from the omission of Trammell's affidavit to mention or to justify such a clause, affiant is led to believe that National has abandoned the exclusivity feature. Affiant is informed that on or about December 4, 1941, National advised its affiliates that it has abandoned this feature of its contracts.

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[9] Such provisions are contained in contracts between National and not less than 30 affiliates in the western part of the United States, including the Pacific Coast, and in contracts between Columbia and virtually all its affiliates. Beginning about 1937 Columbia has introduced an apparent limitation in its contracts which has since then been extended to most of them, namely, that the total amount of time per week upon which Columbia may exercise its option shall not exceed 50 "converted" hours (the equivalent of approximately 79 clock hours in actual practice, since 2 daytime hours are deemed the equivalent of one evening hour). Since the hours under option are not specified, however, the Columbia provision is the equivalent of an option on *all* the station's time until the maximum is reached.

[10] Such provisions are contained in practically all the remaining contracts between National and its affiliates, and cover the hours from 10 a. m. to 12 noon, from 3 p. m. to 6 p. m., from 7 p. m. to 7:30 p. m., and from 8 p. m. to 11 p. m.

[11] This is true of nearly all contracts between National and Columbia and their respective affiliates.

time broadcast stations (covered by Regulation 3.106) has had the same restrictive effect, but, in order not to complicate the discussion, such ownership will not be separately treated in this affidavit.

2. *The limited number of broadcast stations in many cities.* While there are, as of November 1, 1941, 877 broadcast stations in licensed operation in the United States,[12] many of these stations are wholly or partly unsuitable or unavailable as network outlets, because of their non-commercial character, or because of restrictions on their hours [fol. 280] of operation (e. g., stations required to close down at sunset or shortly thereafter), or because of inadequate coverage to serve the cities in which they are located (due to low power or undesirable frequency or interference), or because they are located in towns which are too small to be attractive to advertisers or are within areas served by four or more stations. There are only approximately 21 cities adequately served by 4 or more full-time broadcast stations. Of the remaining cities, approximately 24 are adequately served by 3 full-time broadcast stations; 59 are adequately served by 2 full-time broadcast stations; and, of cities having a population over 50,000, 44 are adequately served by only one full-time broadcast station. A list of cities classified according to the number of full time stations located therein and also according to the number of full time stations from which such cities receive adequate service is set forth in Appendix F, attached hereto. Many of the cities adequately served by only 3 full-time stations, some of the cities adequately served by only 2 full-time stations, and a few of the cities adequately served by only 1 full-time station, are of large or substantial population, or are the centers of recognized trade areas, constituting attractive markets for national advertisers. Because of technical reasons having to do with the limited frequencies available for use by broadcast stations, and limitations on the extent to which two or more stations can operate simultaneously on the same or adjacent frequencies without undue interference, it is, generally speaking, impossible in the present or any immediately foreseeable future state of the art to provide additional full-time stations in such cities.

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[12] In addition, as of November 1, 1941, construction permits were outstanding for 38 new stations.

3. *Effect of contract provisions on network access to markets.* With four national networks in operation, the effect of the contract provisions described is that in any city having less than four full-time stations, one (or more) of the networks is either entirely or largely barred from access for its program service to the city and its environs, and from offering coverage of the city and its environs to any national advertiser, depending on the type of restrictive provisions in effect with respect to the stations serving such city. Similarly, the listening public in any such city is either entirely or largely barred from access to the program services of such network or networks. In actual [fol. 281] practice, under existing contracts, there are 7 cities (shown in Appendix F) adequately served by only 3 full-time stations in which Mutual's only access is through stations primarily affiliated with National under contracts which, while not containing the exclusivity feature, contain option-time provisions covering most of the station's more desirable hours.[13] In such cities, Mutual's only access has been (a) to the less desirable hours not covered by option, or (b) to the hours covered by option not in actual present use by the network having the option but subject to use by that network on 28 days' notice. In 23 cities served by only 2 full-time stations (shown in Appendix F), Mutual is effectively and as a practical matter denied access because of the restrictive provisions, and in 9 other such cities (likewise shown in Appendix F) Mutual's only access is subject to option-time provisions in favor of its competitors. For the most part, the cities and towns having only 1 full-time station rendering adequate coverage are smaller in population and are less important as markets, but they nevertheless include a fairly large number of important centres from which Mutual is completely barred.

4. *The national advertiser's interest in access to markets.* The commercial use of networks of national scope (such as those of National, Columbia, and Mutual) for sponsored programs is by national advertisers, that is, concerns having or desiring markets for their products or services generally throughout all or most of the country, and therefore interested in having their programs heard by as large a

[13] See footnote 10 above.

portion of the public as is possible, consistently with the amount of money available to them for radio advertising and the probable return therefrom. This interest naturally centers first on the larger cities, which, because of concentrations of population not only within their corporate limits but also in their environs and in the trade areas tributary to them, generally provide the larger audiences per station and are vital to any national advertising campaign. The interest extends, however, to medium-sized and, progressively, to smaller cities and their respective trade areas, until a point is reached where the prospective audience may be too small, in proportion to the outlay and prospective [fol. 282] return, to attract the advertiser. It has been the experience of all networks (including Mutual), however, that as a sponsored program gains an audience in the larger markets and demonstrates its value to the advertiser, the advertiser seeks to extend the program to other and smaller markets, over a larger network of stations, and over a larger portion of the country. Thus, sponsored programs which at the outset were broadcast over comparatively few stations in the larger cities and in only a portion of the country's area have almost regularly been extended so as to be broadcast over a nation-wide network. In addition to the foregoing, there are national advertisers who, because of the location of their dealers, distributors, jobbers, sales organizations, or retail stores, or because of regional differences in habits and in demand for particular products or services, or because of the advertising campaigns of competitors, require access to certain but not all of the smaller markets in addition to the larger markets.

5. *The national advertiser's interest in continuity of his sponsored program.* Contracts between network organizations and advertisers (usually through advertising agencies) for the use of a network of stations for the broadcasting of a sponsored program are customarily for a period of 52 weeks, cancellable at the end of any 13 weeks' period. It is the experience of all networks (including Mutual) that if use of the network has given satisfactory results and the advertiser's needs and desires with respect to continuous service and expansion are met, the great majority of such contracts are renewed from year to year for use of the same network on the same day, and at the same hour with the same, or an improved, character of program. A vital and

usually determinative factor, however, in persuading an advertiser to enter such a contract with a particular network organization in the first instance, or to continue with and to renew such a contract thereafter, is the ability of the network organization to assure the advertiser of continued and uninterrupted regular broadcasting of his program over the stations which the advertiser has agreed to use, for the period of the contract and on the day and at the hour selected by the advertiser. The reasons for the importance of this factor include the following:

a) Most sponsored network programs entail large expenditures by the advertiser for talent and material used [fol. 283] in the production of such programs. This is made possible by the fact that, through the use of wire-line systems, the same program can be transmitted for simultaneous broadcasting to the audiences of many stations, and therefore to a much larger public, with a correspondingly greater return to the advertiser, without any increase in the cost of producing the program. The loss of audience resulting from unavailability of access to a desired market, or from discontinuance of the program by any station on the network in such a market, means a corresponding diminution in the return to the advertiser for his outlay.

b) Any sponsored network program requires a substantial period of time (usually not less than eight weeks and frequently longer) before it acquires a regular audience and a goodwill with the public served by a particular station of a character satisfactory to the advertiser, and, once it has acquired such an audience and goodwill (which, in the case of any good program, increases with the length of the period of time during which the program is broadcast), the advertiser has a considerable investment therein which is lost if the station becomes unavailable and the advertiser is deprived of access to the market.

c) When a new network commercial program is about to be broadcast, or is being broadcast, it is the practice of the advertiser sponsoring the program to make large expenditures for promotional advertising in newspapers and other media to attract public attention to the program, and to take appropriate steps to inform his dealers, distributors, jobbers, sales organizations or retail stores in each community about the program and enlist their coop-

eration in promoting public interest therein by advertising and other means. The advertiser has a considerable investment resulting from such expenditures in each community, which is lost if the station in that community becomes unavailable and the advertiser is deprived of access to the market.

d) Most network commercial programs have a continuous and connected character, frequently having a nature and importance corresponding to that of instalments in a serial story, or of sequels. In addition, a vital feature of successful radio advertising is consistent repetition at regular and scheduled intervals, known to and expected by [fol. 284] the public. Much of the value of such programs to the advertiser is in preserving a regular audience for such programs against interruption or discontinuance thereof, and against shifts in the day and hour for which they are scheduled. Particular hours in the day are more important to the advertiser than other hours, either because (as in the case of certain evening hours, such as 8 p. m. to 10:30 p. m.) there is a greater potential audience, or because some hours are more appropriate for a given type of program than other hours. Ordinarily, the advertiser has, at the outset, selected the best hours available for his purposes. If, by reason of a station's becoming unavailable at the scheduled hour, the advertiser is compelled to shift his program to another hour on the same station, he suffers serious disadvantages and loss of return on his expenditures because (1) the audience built up for the scheduled hour is dislocated and is temporarily and, to some extent, permanently lost (not infrequently to a competitor), and a new audience must be built up, with corresponding expenditures for promotion; (2) the hour to which the program is shifted (sometimes to the next day) is usually less desirable with respect to potential audiences, or appropriateness for the program, or timeliness, and may, in turn, likewise be subject to further shifting and repetition of the same experience; (3) when such shifts occur, the broadcasting of the program over the station involved must be done by transcription and, under the regulations of the Federal Communications Commission, must be announced as such, with a consequent and very real loss in the effectiveness of the program with the public as against a broadcasting of the program instantaneously at the time of performance by live talent;

(4) the network commercial programs of one of more competitors of the advertiser may, and frequently are, being broadcast over other stations (or the same station) in the same market without being subject to these disadvantages.

6. *Factors necessary to assure equal competitive opportunity for national networks.* In order to have equal opportunity in securing commercial network programs from national advertisers, a national network organization must be able to offer, on a footing substantially equal to that of its competitors, (a) access to the markets desired by such advertisers, and (b) assurance of the continued broadcasting [fol. 285] of the advertisers' programs at the desired and scheduled time in such markets.[14] Inability in either respect necessarily results in a preference for, and a choice by, national advertisers of other national network organizations not thus handicapped, both in originally placing their business and in continuing business already placed, even though in all other respects such advertisers may prefer the handicapped organization on its merits. Many cities are of such importance (including a number of cities adequately served by less than four full-time stations, from access to which Mutual is either completely barred, or is barred on a continuous basis during the more desirable hours, by the restrictive contracts of National and Columbia, as shown in Appendix F) that the inability of one network and the ability of a competing network to afford access thereto on a continuous basis to a single such city will usually determine the choice of the advertiser. Other cities (including a large number adequately served by less than four full-time stations, from which Mutual is either wholly or largely barred as aforesaid) are of sufficient importance so that, while such access to a single such city may not determine the advertiser's choice, access to two, three or a larger number of such cities, depending on their importance and their ap-

[14] As stated by Mr. Paley in his affidavit (pages 12-13):

"Nor will the advertiser embark upon the costly venture of a nationwide radio program series unless the relations between the network he selects and its affiliated stations are sufficiently stable so that he may reasonably expect to maintain his coverage and enjoy the cumulative fruits of his efforts to please the listening public and promote sales of his product."

peal to the particular advertiser, will determine his choice. The choice by an advertiser of one network over another for such reasons results in loss of revenue for the latter network and its affiliates not only with respect to the markets to which the losing network does not have such access but also with respect to all other markets in which it does have such access, as well as a loss of prestige with both advertisers and advertising agencies. The handling and placing of nearly all national network advertising is controlled by a limited number of agencies. The appraisal and judgment of these agencies of the respective abilities of [fol. 286] competing networks to afford the desired continuous access to markets is frequently a determining factor in the choice of networks and, by reason of their great interest and their continuous and competitive activities in the field, such agencies are intimately familiar with the facts and circumstances bearing on such access in connection with each network. In addition, there are several trade journals wholly or largely devoted to the broadcasting industry, including *Broadcasting*, *Variety* and *Radio Daily*, which circulate among all advertising agencies and, to a large extent, among national and prospective national advertisers, which trade journals regularly report, as items of news interest to their readers, the acquisition or loss of business by any national network organization, and frequently the reasons therefor, with corresponding enhancement or impairment of the prestige of the network involved, and with corresponding effect on its ability to retain existing business and to obtain further business.

7. *Competitive use of such factors by National and Columbia in representations to agencies and advertisers.* At all times since shortly after the organization of the Mutual network, and particularly since it became a nation-wide network, National and Columbia, in competing with Mutual for the business of national advertisers, have made, and have caused their salesmen, representatives, and agents to make, representations to advertising agencies and advertisers that, because of their contracts with affiliates in markets adequately served by less than four full-time stations, needed or desired by the advertiser,

a) Mutual is unable to provide any access at all in certain of such markets, either at the outset or in case of expansion;

b) Mutual is unable to provide access on an assured continuous basis in a number of other of such markets during the more desirable hours, or the hours usually needed or desired by the advertiser;

c) Any such access as Mutual can obtain for a network commercial program in the class of markets last mentioned during the more desirable hours, or the hours usually needed or desired by the advertiser, will be subject to discontinuance or to shift on 28 days' notice at the demand of National or Columbia (as the case may be), with the at- [fol. 287] tendant inconveniences, resorts to transcriptions and less favorable hours, loss of investment and audience, and other disadvantages heretofore pointed out.[15]

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[15] In certain instances, examples of which are pointed out below, this representation has been accompanied by specific threats on the part of National's Blue Network that all, or an important part, of the precise time desired by the advertiser on stations in such markets would be preempted by National under its option-time privileges for another specified advertiser who was ready and willing to use the time for a network commercial program over the Blue Network. The cities in which are located stations jointly affiliated with National or Columbia and Mutual, but in which Mutual's access is subject to the restrictive contract provisions in favor of National or Columbia, are as follows:

Cleveland, O.	Harrisburg, Pa.
Houston, Texas	Binghamton, N. Y.
Memphis, Tenn.	Evansville, Ind.
Birmingham, Ala.	Manchester, N. H.
Omaha, Neb.	Augusta, Ga.
Richmond, Va.	Cedar Rapids, Iowa
Jacksonville, Fla.	Lancaster, Pa.
Des Moines, Iowa	Corpus Christi, Texas
Salt Lake City, Utah	York, Pa.
Bridgeport, Conn.	Columbia, S. C.
Tulsa, Okla.	Bangor, Me.
Spokane, Wash.	Weslaco, Texas
Charlotte, N. C.	Shenandoah, Iowa

In all but 3 instances, the stations in question are affiliated with National.

d) Advertisers who have used the Mutual network in the past have been subjected to such handicaps and disadvantages and, as a result, have left the Mutual network and have placed their business with National or Columbia.

Such representations have caused, and are continuing to cause, Mutual to lose the business of national advertisers who have placed their business with National and Columbia and who, as affiant is informed and believes, would otherwise have placed their business with Mutual. The situation has arisen much more frequently in Mutual's competition [fol. 288] with National's Blue Network, than with National's Red Network or Columbia because National has been able to sell only a comparatively small amount of the time it has had under option over its Blue Network affiliated stations and such stations consequently have a much larger amount of time available during their more desirable hours for the programs of another network, and a much greater need for revenue and a corresponding desire and interest in having such use made of their time, than is true of most of the Red Network and Columbia affiliated stations. As is hereinafter set forth in detail National has, usually in the interest of its Blue Network, from time to time actually exercised its option-time privileges under its contracts with affiliates in markets such as those which have been described so as to force advertisers who were theretofore using the Mutual network to take their business and their programs from Mutual and to place them with National, either because the advertisers were blocked from further desired expansion for their programs, or because they were completely denied access to markets needed or desired by them, or because of having to shift their programs to delayed broadcasts by transcription. The result has, on occasions, been simply that, with respect to such markets, the same advertiser with the same program would continue the use of the same stations at the same hour, but to do so was forced in other markets to use National's Blue Network instead of the Mutual network. In addition to the representations above described, National, in order to induce advertisers to use its Blue Network, (a) has given them the benefit of a system of large discounts made possible only by its very profitable operation of the Red Network, (b) has assured such advertisers that, if they will use the Blue Network, they will be given the benefit of the first opening of

suitable time that develops on its Red Network, and (c) has given such advertisers the benefit of a combination of the better stations affiliated with both the Red and the Blue Networks, all of these being competitive advantages for National possible only because of its ownership and operation of two supposedly competing national networks.

8. *Representations with respect to effective date of the Commission's Regulations.* In addition to the representations summarized in the preceding paragraph, as affiant is informed and believes, National and Columbia are, and ever [fol. 289] since the Commission's Order of May 2, 1941, have been, making, and causing their salesmen, representatives and agents to make, representations to advertising agencies, to national advertisers, and to their affiliates, that, by reason of proceedings which they proposed to institute in court (including these pending proceedings), the Commission's Regulations would not go into effect in less than two or three years (if at all) and that during such period of time affiliates may safely enter into or renew contracts with National or Columbia containing provisions such as those forbidden by the Regulations, and national advertisers cannot place their business with Mutual without being subject to the hardships and inconveniences already described. As a result of such representations, coupled with the successful exercise by National of its option-time provisions within the past two months to its advantage and at the expense of Mutual, all as hereinafter more fully set forth, Mutual has lost business of vital importance to its continued success, and is immediately threatened with the loss of further such business, and, unless the Regulations are permitted to go into effect, affiant fears it will continue to lose such business to a point where its existence will be endangered.

9. *Current and past examples of loss of business by Mutual because of the restrictive contracts.* (a) *The Ballantine Program.* In June, 1941, after extensive efforts and outlay, Mutual secured, and entered into, a contract with J. Walter Thompson Company, one of the leading advertising agencies, acting in behalf of its client, Ballantine & Sons, brewers of ale and beer, for the broadcasting of a network commercial program over 77 stations affiliated with Mutual at the scheduled hour 9:30 p. m. to 10 p. m. (New York City time) on Friday nights, for the usual period of

52 weeks, commencing in September, 1941, cancelable on four weeks' advance notice at the end of any 13-week cycle. The program which was proposed to be broadcast, and which was thereafter brodacast, was of outstanding audience appeal and was of a character and quality of excellence such as to contribute greatly to the prestige of Mutual and its affiliates, with a heavy cost of production for the advertiser and featuring popular and well-known artists and talent such as Charles Laughton, Milton Berle, Shirley Ross, and Bob Crosby's Orchestra.

Included among the 77 stations were 14 in cities adequately served by less than four full-time stations. All 14 [fol. 290] stations were (and are) affiliated with National under contracts containing network option-time clauses above described. The call letters, location and network affiliation (other than with Mutual) of these stations were and are as follows:

WHK	Cleveland	Blue Network
WTAG	Portland	Red "
WCSH	Worcester	Red "
WTIC	Hartford	Red "
WICC	Bridgeport	Blue "
WMFE	Plattsburg	Blue "
WGAL	Lancaster	Red and Blue Networks
WORK	York	Red and Blue "
WJHP	Jacksonville	Blue Network
WEAN	Providence	Blue "
WKBO	Harrisburg	Red and Blue "
WKAT	Miami	Blue Network
WLBZ	Bangor	Red and Blue "
WXYZ	Detroit	Blue Network

It was necessary for the 14 stations to accept the Ballantine program subject to the exercise by National of its privilege under the network option-time provisions to preempt the time on 28 days' notice.

On or about September 15, 1941, 10 of the 14 stations notified Mutual they could not continue to broadcast the Ballantine program after October 10, 1941, at the scheduled hour (namely, from 9:30 to 10:00 p. m. on Friday evenings) because that time was subject to option by National and National had exercised its option for the broadcasting of a program sponsored by the Canada Dry Company. The

stations advised Mutual that on and after October 10, 1941 the program would have to be broadcast by them through the use of transcriptions at a later hour (meaning another day in most instances), which substitute time, to be satisfactory to the advertiser (that is, in equally desirable hours), would necessarily be at an hour likewise subject to preemption by National on exercise of its option privileges. National's action in exercising its option worked to the injury of the 10 affiliates in that not only did they have to accept a lower basis of compensation from National than from Mutual but the Canada Dry program was for 25 min- [fol. 291] utes instead of 30 minutes, thus further reducing their compensation.[16]

On October 23, 1941 Mutual was notified in writing by J. Walter Thompson Company that the agency was canceling the Ballantine program effective after the broadcast on October 31, 1941. A copy of this letter and enclosure is attached hereto as Appendix G. Since the contract was binding for a 13-week period ending December 5, 1941, the agency offered to compensate Mutual for time from October 31, 1941 to December 5, 1941, without making use of the Mutual network if Mutual would not release the agency from its obligation. The amount thus to be paid to Mutual was $27,711.75 for the five weeks involved, plus an additional $17,984.20, because of the inapplicability of the short rate, resulting from broadcasting only eight weeks instead of 52 weeks. This amount constituted approximately 16 per cent of the total amount that Ballantine would have been called upon to pay to Mutual under its contract for the 52-week period, and, in the absence of any rate concession made by National to the agency or the advertiser, is indicative of the value placed by them upon the continued and assured access which National was able to provide to the markets in question.

Prior to soliciting and procuring the Ballantine account, National had not accepted any beer or liquor advertising over either its Red or Blue Networks for several years, and

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[16] Affiant is informed and believes that the primary reason the Canada Dry Company scheduled its program with National rather than with Mutual was that Mutual could not assure continuous access to the markets served by these 14 stations at an hour acceptable to the advertiser, whereas National was in a position to do so.

had allowed it to be understood that it was its regular policy not to accept such advertising. To secure the Ballantine program, therefore, and to deprive Mutual thereof, National introduced a major change in its policy, at least for the Blue Network. On information and belief, affiant further states that, as an additional inducement to the advertising agency, National informed it that if Ballantine would make use of the Blue Network it would have the privilege of transferring to the Red Network as soon as time thereon [fol. 292] should become available and National should decide to accept such advertising on the Red Network.

On October 27, 1941, Mutual was advised by J. Walter Thompson Company, both orally and by letter, that the Ballantine program would continue over Mutual for the remainder of the 13-week period, thus rescinding the cancellation as of October 31, but canceling the program as of December 5, 1941. A copy of the letter and enclosure, both dated October 27, 1941, is attached hereto as Appendix H. Since that date the program has been discontinued on the Mutual network and has been broadcast over National's Blue Network. Mutual's loss of the program has entailed not only loss to it and to its affiliates of the very substantial revenue involved for the remainder of the original contract period and any renewals thereof which the agency and the advertiser might otherwise have agreed to, but also the loss of a very important and popular program and of the audience resulting therefrom, as well as a corresponding loss of prestige among advertising agencies, advertisers, and actual or prospective affiliates. To illustrate the wide publicity attendant upon such an occurrence, affiant refers to news items appearing in the trade magazine *Broadcasting* for October 27, 1941, at page 50, and in the trade magazine *Variety* for October 29, 1941, at pages 31 and 38, copies of which are set forth in Appendix I.

(b) *The March of Time Program.* In June, 1941, Mutual entered upon negotiations with Time, Inc., publishers of *Time* Magazine, for the broadcasting over the Mutual network of a program known as "March of Time". This program had been formerly on the Columbia network, but had not been broadcast for some two years. Mutual was given to understand by the representatives of Time, Inc., that during the coming year the Mutual network would be used for the purpose. Thereupon, as affiant is informed and believes, officials of National proceeded directly to the rep-

resentatives of Time, Inc., and told the latter, in substance, that if Time, Inc., placed its program on Mutual, National, through the exercise of its option privilege to preempt broadcasting time of affiliate stations, would see to it that the "March of Time" program would be either eliminated from stations in a number of important markets or, in the alternative, forced to delayed broadcasts by transcription. More specifically, as affiant is informed and believes, National's said officials represented that National had an order [fol. 293] from a concern known as the Clark Candy Company which could be applied to the precise half-hour in question (8:00 p. m. to 8:30 p. m. on Thursday nights) and that, after "March of Time" went to Mutual, the Clark Candy program would be used for the purpose of such elimination, but if the "March of Time" program would use National's Blue Network the Clark Candy program would be moved to, and scheduled on, the half-hour immediately following. As the result of said representations by National officials, Time, Inc., purchased time on the Blue Network of National and has been using said network since early in October, 1941, and the Clark Candy program has been scheduled for the half-hour immediately following. National's scheduling of the program for Time, Inc., represented a distinct change in its theretofore publicly announced policy against dramatization of war scenes and impersonations of world figures, as well as its policy against the use of recordings on network programs. In illustration of the publicity attendant upon the change of policy, affiant refers to a reprint from the trade magazine *Broadcasting*, October 13, 1941, page 66, a copy of which is attached hereto as Appendix J.

(c) *The Lucky Strike Program.* Approximately three years ago, Mutual secured the American Tobacco Company as sponsor for a regular weekly program advertising its product, Lucky Strike Cigarettes. The program was Kay Kyser's "College of Musical Knowledge," and had been previously broadcast over the Mutual network as a sustaining program. Because of the popularity of the program and its satisfactory return to the advertiser after a period of about 13 weeks, the advertiser desired to expand the program to reach additional markets but, because of the restrictive contracts of National and Columbia, Mutual was unable to meet the advertiser's needs. The advertiser thereupon discontinued use of Mutual and placed the pro-

gram on National, over which it is still being broadcast under the same name and with the same general character. For the same reason, the advertiser transferred a program "Melody Puzzles" from Mutual to National's Blue.

(d) *The "True or False" Program.* Shortly after Mutual's experience with the Lucky Strike program, Mutual secured the J. B. Williams Company as sponsor for a regular weekly program known as "True or False," at first [fol. 294] broadcast over a few stations and gradually expanding to more stations, including several also affiliated with National's Blue Network under restrictive contracts. National thereafter exercised its option-time privileges to force such stations to broadcast another network commercial program in the time required for "True or False" and, as a result of the hardships and inconveniences caused thereby, the advertiser discontinued the program on Mutual and transferred it to National's Blue Network, over which network the program has ever since been, and is still being, broadcast, on the same evening (Monday) every week.

(e) *The "Don't You Believe It" Program.* In 1939, because of the exploitation by National of said restrictive contract provisions to prevent expansion of the program to other stations and to force stations already broadcasting the program to discontinue or shift it to a delayed broadcast by transcription, Mutual lost the program "Don't You Believe It," sponsored by P. Lorillard & Sons, to National's Blue Network.

(f) *The "Famous Jury Trials" Program.* In 1938-1939, because of the exploitation by National of said restrictive contract provisions to force stations already broadcasting the program to discontinue or shift it, Mutual lost the program "Famous Jury Trials," sponsored by Mennen's. The sponsor went to a combination of Blue and Red stations.

(g) *The Phillip Morris Program.* In 1939, because of Mutual's inability to provide expansion into additional markets on an assured continuous basis because of National's restrictive contracts, Mutual lost a program sponsored by Phillip Morris & Company, and theretofore broadcast over the Mutual network, to National's Blue Network.

(h) *The "Goodwill Hour" Program.* Early in 1940, because of the exploitation by National of its restrictive contract provisions to force stations to discontinue or shift the

program, Mutual lost the program "Goodwill Hour," previously broadcast over its network, to National's Blue Network, over which network the same program is still being broadcast regularly on Sunday evenings.

(i) *General.* The foregoing, while including the principal examples of network commercial programs known by affiant to have been lost by Mutual because of National and Columbia's said restrictive contract provisions, is by no means a complete list. Throughout its existence, Mutual has regularly competed with National and Columbia for each new or prospective national advertiser, as far as known to it, and in the course of this competition a number of such advertisers have placed their business with National or Columbia under circumstances which, so far as known to affiant, indicate that factors based on the restrictive contract provisions either were determinative or contributed substantially to the result.

[fol. 295]

10. *Apprehended loss of further business by Mutual.* (a) *The Coca-Cola Company Program.* In September, 1941, Mutual entered into a contract with the D'Arey Advertising Agency, acting in behalf of its client, Coca-Cola Company, for the broadcasting of a commercial network program over 118 stations affiliated with Mutual five nights a week from 10:15 to 10:30 p. m., and the sixth night from 10:15 to 10:45 p. m. This contract was secured after long and arduous negotiations in competition with National and Columbia, during which National sought to persuade the agency to use National's Blue Network on the representation that if Mutual were used the program would either be eliminated from certain stations or forced to a delayed broadcast by transcription at a less desirable hour. Nevertheless, for reasons having to do with the merits of the respective networks, Mutual was able to persuade the agency and the client to contract with Mutual. Mutual, furthermore, called the attention of the agency and the client to the Commission's Order of May 2, 1941 and the accompanying regulations in answer to the representations made by National, and it is affiant's information and belief that, if it had not been for its so doing, the account would have gone to National. This account is the largest piece of business Mutual has had in its history and, so far as is known to affiant, it is the largest piece of business advertising a single product by any network. It represents over $2,250,-

000 gross billing annually. The program was scheduled to, and did, start November 3, 1941.

As soon as the fact became known that Mutual had secured the contract, National made *d*edoubled efforts to deprive Mutual thereof through exploitation of its option-time contract provisions. Within 48 hours after Mutual had notified its affiliated stations of the Coca-Cola order, [fol. 296] National, which had previously been competing for the same program at the same or other hours, entered into contracts with one of the leading and best known advertising agencies for the broadcasting of two nation-wide network commercial programs on Monday and Wednesday evenings from 10 p. m. to 10:30 p. m. for a large national advertiser, a manufacturer of drugs. Upon information and belief, affiant states that these specific hours were chosen primarily, if not entirely, to enable National to interfere with the broadcasting of Mutual's Coca-Cola program by stations having contracts with National. In any event, the result was that, on or about October 1, 1941, and thereafter, such stations were notified by National that National was exercising its option with respect to the two said half-hours beginning October 20 for two programs, the character of which said stations apparently had no knowledge. Because of such notifications from National, several such stations have been compelled to reject the Coca-Cola program, including stations at Tulsa, Okla., Birmingham, Ala., Houston, Tex., and Spokane, Wash. A number of other stations, however, similarly under contract with National, such as stations at Providence, R. I., Bridgeport, Conn., Richmond, Va., Cleveland, O., Charlotte, N. Car., Memphis, Tenn., Jacksonville, Fla., Ogden, Utah, and Des Moines, Ia., relying upon the Commission's regulations of May 2, 1941, as revised October 11, 1941, have declined to accede to National's demands. Due to the number and importance of such cities, together with the other cities on the Mutual network, the advertiser has not left Mutual. Affiant believes and states the fact to be that, if the effective date of the regulations is postponed for any substantial period of time and National is permitted to compel these stations to adhere to their existing contracts, Mutual will lose this account. The client is unwilling, and has expressly stated its unwillingness, to take any station which does not broadcast the program all six evenings of the week on a live basis at the time scheduled (rather

than by transcription), as otherwise the effectiveness of the particular advertising campaign of the client would be greatly impaired.

To illustrate the extremely unfavorable publicity which has already attended National's efforts to deprive Mutual of this program, affiant refers to articles appearing in *Variety*, October 8, 1941, at page 24, and *Broadcasting*, October 13, 1941, at page 14, copies of which appear in Appendix K.

[fol. 297] (b) *The Bayuk Cigar Company Program.* The Ivey and Ellington Agency, in behalf of its client, the Bayuk Cigar Company, has been a regular user of the Mutual network, purchasing initially three one-quarter hours and now using five one-quarter hours a week. In all of the important markets where there are only three stations, the advertiser has been compelled to accept delayed broadcasts by transcription. Within the last two months the advertiser has notified Mutual of its intention to discontinue the use of the Mutual network and to purchase the Columbia network because of the large number of delayed broadcasts by transcription to which the advertiser has been subjected over the Mutual network (due to National having exercised its privilege under option-time contracts and having placed other network commercial programs in the time used by the advertiser over such stations). The advertiser contemplated adding another broadcast period a week to its schedule. It was unwilling to accept any delayed broadcasts by transcription and insisted upon assured time as scheduled. In view of the Commission's action of October 11, 1941 and relying thereon, Mutual assured the advertiser that, if it would purchase 8:00 to 8:15 on Friday night, which was currently unused by National's Blue Network on its affiliate stations, Mutual would be able to provide Bayuk with uninterrupted broadcasting at the scheduled time. As a result, the advertiser has renewed its contract and has added the additional one-quarter hour. If the option-time privilege is successfully exercised by NBC on any of these stations, the advertiser will definitely exercise its right of cancellation with the Mutual network, and Mutual and its affiliates will lose the program.

(c) *General.* The loss of the Cocoa-Cola and the Bayuk Cigar Company programs, or either of them, would greatly and irreparably injure Mutual and its affiliates from the

point of view of both revenue and prestige. Mutual has, at present, a total of 14¼ hours a week sold for network commercial programs over stations under contract with National or Columbia, within periods of time embraced by option-time provisions in those contracts, in markets regarded as essential by advertisers. As long as the restrictive contracts are permitted to be maintained in force, Mutual is subject to the continuous hazard of losing all or [fol. 298] any portion of these programs. The figure constitutes a very considerable portion of Mutual's total of network commercial programs and the loss of all or any very large portion of the 14¼ hours a week would be fatal to Mutual's continued existence as a national network. Furthermore, until the Commission's Regulations go into effect, Mutual will be virtually unable to sell any more time for commercial network programs during the more desirable hours, namely, those covered by National's option time provisions. Representatives of three of the largest advertising agencies in the country, handling a very large and important volume of national advertising, have expressly stated to Mutual that they will not purchase time over Mutual for any client of theirs in such hours unless and until Mutual can give assurance with respect to continued clearance of the scheduled time equal to that which National or Columbia is able to give.

11. *Effect on Mutual's ability to secure and retain desirable affiliates.* Loss of business and the consequent loss of prestige such as Mutual has already suffered because of the restrictive contract provisions, and such as is threatened if those provisions are kept in force, has a serious adverse effect on Mutual's ability to secure and retain affiliate stations located in important markets and necessary to its successful operation as a national network. Under contracts between Mutual and its affiliates, the affiliates directly or indirectly bear the expenses of wire-lines necessary to link their stations with the Mutual network and, if the revenue received by an affiliate from Mutual drops below this expense (as is already the case in a number of instances), the affiliate tends to, and will, if the drop is substantial, terminate his affiliation with Mutual and thus deprive Mutual of an outlet in the market served by his station. In certain other instances where the affiliate's station has, for example, better coverage or a larger audience than

the station affiliated with National's Blue Network serving the same market, Mutual will be unable to retain the affiliate as against the Blue Network and will be forced to accept a less desirable affiliate. Generally, the national network organization which is able, through volume of business or otherwise, to provide the larger revenue (subject to the qualification that it also provides the affiliate with a good continuous program service, commercial and sustaining), is [fol. 299] able to secure the station with the better coverage and the larger audience in any community, and to force the station to accept the maximum of whatever restrictions by way of exclusive option-time are permitted. Mutual, because of its smaller volume of business, is already under a heavy handicap in this respect, in competing for affiliates with either National's Red Network or Columbia's network, and is under somewhat of a handicap in competing for affiliates with National's Blue Network. Further loss of revenue will irreparably injure Mutual in this respect.

VI

Lack of Injury to National and Columbia Through Immediate Enforcement of Regulations

1. *Discussion limited to certain Regulations.* Affiant's discussion will be confined primarily to Regulations 3.101, 3.103, and 3.104, having to do respectively with network exclusivity, length of contract, and option-time. By their language, and the provision made by the Commission for such extensions of time as may be necessary, Regulation 3.106, having to do with network ownership of stations, and Regulation 3.107, having to do with the operation of two supposedly competing networks by one organization, do not appear to have or threaten any immediate effect on either National or Columbia. Columbia's complaint does not seek relief against either of said Regulations or Regulation 3.108. Throughout its existence and without difficulty, Mutual has operated in conformity with Regulations 3.105 and 3.108, having to do with the affiliate's right to reject network programs and to fix its own rates on non-network commercial programs. Regulation 3.102, having to do with station exclusivity, obviously cannot operate to the injury of a network, but is of importance in a consideration of the effects of Regulations 3.101 and 3.104 and will be discussed incidentally in connection therewith.

2. *No adverse effect in cities adequately served by four or more full-time stations.* Apart from, and in addition to, the facts and circumstances recited in later paragraphs under this heading, Regulations 3.101 and 3.104, forbidding network exclusivity and restricting the use of option-time, cannot have any appreciable adverse effect on either National or Columbia in any city adequately served by four or more [fol. 300] full-time stations. In each such city, each of the four national networks (National's Red, National's Blue, Columbia, and Mutual) already has its regular full-time affiliate, and there will be no occasion or tendency on the part of any one of these networks to attempt to make use of a station affiliated with any of the others. It is very important to any network that, so far as possible in any city, it have a regular affiliate, (a) known and advertised to the public as such, available not only for its network commercial but also its network sustaining programs, (b) interested in promoting the network and securing business and goodwill for it, and (c) in a position to cooperate with the network in providing programs or facilities for securing programs originating in that locality. The network organization will willingly and regularly accept a station with smaller coverage as its regular affiliate in preference to sharing the time of a station with greater coverage with another network, and will willingly and regularly contract to give such station first call on its programs as permitted by Regulation 3.102. That a form of contract complying with the Regulations and at the same time preserving this right of first call in a manner satisfactory both to networks and to affiliates, can easily be worked out and formulated, has alreay been demonstrated by Mutual in the contracts which it has drafted for this purpose, hereinbefore described. Each network having given first call on its programs to its respective affiliates, clearly there can be no such effects in such cities resulting from the operation of Regulations 3.101 and 3.104 as are stated or implied in the affidavits of Mr. Trammell and Mr. Paley. The unlikelihood of any complication arising from an attempt to create an "advertising super-network", is separately discussed below.

3. *No adverse effect with respect to time already in use for network commercial programs.* Nothing in the Commission's Regulations prevents, or interferes with, the carrying out by each network organization of any and all

contracts with advertising agencies and advertisers for the use of any and all time now being used, or contracted to be used, over affiliated stations, for network commercial programs. This is true regardless of the amount or proportion of any station's time now subject to such contracts, regardless of the length of the period of time covered thereby, and regardless of the number of stations rendering ade-
[fol. 301] quate service to a given city. Since virtually all such contracts are for a period of 52 weeks, and since ordinarily they expire in the early fall, the network commercial programs currently being broadcast thereunder over the National and Columbia networks will not, in the overwhelming majority of instances, be subject to disturbance or displacement in favor of the programs of another network or in favor of any non-network program earlier than the fall of 1942. Even then, due to the likelihood that the advertiser will desire to renew his contract for a further period of 52 weeks, due to the great interest, both financial and by way of prestige, which he, the affiliate, and the network have in such renewal, and due to the fact that, by reason of his continued use of such time, it will be clear for such purpose, the overwhelming probability is that it will be renewed over the same network and the same affiliate stations. In other words, neither the prohibition against network exclusivity nor the restrictions on option-time can have any adverse effect on time now already used over any station for National or Columbia network commercial programs. By the same token, but due to the Regulations becoming effective, time now actually in use over any station for Mutual programs cannot, during the period of the contract with the advertiser, be preempted for a new commercial program offered by another network.

4. *No adverse effect from limitation of option time to three hours per segment.* Passing over, for the moment, the requirement of Regulation 3.104 that option time provisions must henceforth be non-exclusive as between networks, affiant points out that, in the light of the undisputed facts, no adverse effect can result to National or Columbia from the limitation of network option-time to three hours per segment. Affiant states that, in the light of his experience, the Commission's division of the day into four segments (8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6. p. m. to 11 p. m. and 11 p. m. to 8 a. m.) corresponds as nearly as is practi-

cable, without undue complications of detail and with due regard for differences in time zones across the country, to the recognized and generally accepted listening habits of the public, the evaluation of the hours of the day as to relative desirability from the point of view of advertisers and the various classes thereof, and the needs for time on the part of non-network advertisers, for sustaining programs, [fol. 302] and for purposes of programs of a local and regional character. The reservation by the Commission of anything over three hours in each segment free from network option corresponds very closely with actual practice in the case of those networks having the largest volume of network commercial programs, namely, National's Red Network and Columbia, and their affiliate stations. While in a few segments per week, one or the other of these networks may have slightly over three hours in actual use on some evenings on some (but by no means all) of their affiliate stations, the average actual use is substantially less than three hours per segment, and in those few instances where it is not, nothing in the Commission's Regulations prevents the continuance of such use under existing contracts with advertisers, or, with the consent of the stations involved, the renewal of such contracts.[17]

5. *No adverse effect from prohibition of option-time exclusive against other networks.* As affiant has already shown, in cities adequately served by four or more full-time stations, the restrictions imposed by Regulation 3.104 (as well as Regulation 3.101) cannot, as a practical matter, have any adverse effect on either National or Columbia. Affiant will now show that, so far as any legitimate purpose of option-time is concerned, the same is true in cities adequately served by less than four full-time stations.

Because of the inherent characteristics of network broadcasting, including virtually instantaneous transmission

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[17] In the morning segment, from 8 a. m. to 1 p. m., National, under its existing contracts, on both its Red and Blue Networks, has an option only on two hours (from 10 a. m. to noon), and in the afternoon segment, from 1 p. m. to 6 p. m., only three hours, (from 3 p. m. to 6 p. m.). Its evening option is 3½ hours (7 p. m. to 7:30 p. m. and 8 p. m. to 11 p. m.). It has no option on time between 11 p. m. and 8 a. m.

over wire-lines to all parts of the country and simultaneous broadcasting by many stations of the same program, it is highly important, as a business convenience, that obstacles to the necessary clearance over the desired stations be eliminated so far as practicable. These obstacles, however, consist primarily in the scheduling by individual stations of *non-network* programs (local or national spot) at vari-[fol. 303] ous hours, and, in the absence of provision for clearance of time against such programs, make it necessary for the network to consult, and in some instances, negotiate, for clearance of the time desired for a particular network commercial program. Such obstacles are not insuperable, as has been demonstrated by the operation of the Mutual network without option-time from its establishment in the fall of 1934 until early in 1940, and even since then with respect to a large number of its affiliates, as well as by the operation of National's networks without option-time to any substantial degree until after 1935. Regulation 3.104, however, permits option-time affording adequate and entirely sufficient clearance for three hours per segment against all obstacles.[18]

By reason of their large existing use of the more desirable hours in each segment, the fact that existing contracts with advertisers are not disturbed by the Regulations, and the fact that each affiliate will desire to, and will, obtain first call upon the programs of any network with which it is affiliated, neither National's Red Network nor Columbia can possibly suffer any appreciable adverse effect from the restriction under discussion. Their respective affiliates

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[18] Mr. Trammell's statement is his affidavit (page 20) is, in the light of the facts above stated, completely without foundation:

"Consequently, if optional time is prohibited, each and every advertising contract negotiated for such hours on the Red network would require negotiation by NBC with a minimum of 44 stations. In the normal course of its business, each of these stations would, under the Commission's amended Order, be scheduling the programs of other networks. Despite these conflicting demands, therefore, NBC would have to obtain the unanimous consent of not less than 44 persons, firms and corporations for each program scheduled."

in cities having less than four full-time stations will desire to remain their affiliates and to have first call on their programs. The case is somewhat different with National's Blue Network which, by reason of its smaller volume of business, is actually making use of only part of the time of its affiliate stations which National has under option. It will be adversely affected in that in cities served [fol. 304] by less than four full-time stations, with respect to those hours which it now has under option but has not been able to sell to any advertiser, it will (if the Regulation goes into effect) henceforth be deprived of its power to prevent its affiliates in such cities, at their discretion, from accepting and assuring the continuous broadcasting at the scheduled hour of network commercial programs provided by another network. In other words, National will, with respect to its Blue Network, be unable to exploit network option-time as a device to prevent or eliminate competition by another network, as distinguished from the legitimate purpose of option-time to provide simultaneous clearance over a number of stations as against non-network programs.

The prohibition against exclusive options will neither introduce nor lead to any appreciable confusion, difficulty in clearance, or necessity for negotiating with a number of stations as a prerequisite to entering into a contract with an advertiser. Each national network organization knows, and continuously maintains up-to-date information on, the use made by each of its affiliates of all time likely to be in demand for network commercial programs, and, in the case of cities adequately served by less than four full-time stations in which its affiliates may be serving also as the affiliate for another network, knows, and continuously maintains up-to-date information on, all time used over the station by the other network. Prospective national advertisers desiring new network commercial programs, or programs in addition to those already being broadcast, are not numerous and usually appear or become available singly and at the rate of only a very few per year. In all but a tiny fraction of cases, all four national network organizations know of each prospect and actively compete for his business. Since most of the more desirable hours, particularly in the evening, are already in use over National's Red Network and Columbia, in most instances the competition is reduced to being between National's Blue Network and Mutual, each of which endeavors to provide the advertiser

with access to the markets desired by him and in so doing offers access to the *same* stations in many cities (already enumerated) adequately served by less than four full-time stations. Once the time in question over these stations is sold to the advertiser by one of these networks, it is, of course, unavailable over these same stations to the other network for the period of the contract with the advertiser [fol. 305] (in the absence of exclusive option-time provisions in favor of the other network, such as are now exploited by National), but this is no more a disadvantage to one network than to the other, and is no more an injury to one advertiser than another, and cannot rightly be considered an injury to anyone, much less to broadcasting as an advertising medium. If it be deemed an injury to one network, it is relatively slight and is more than counterbalanced by the benefit to the affiliated stations and their audiences, and by the benefits resulting from active and fair competition on the merits of the competitors.

6. *No adverse effect from limitation of call period to 56 days.* So far as affiant knows, in all existing contracts of National and Columbia, the options may be exercised on not less than 28 days' notice. The increase in this call period to 56 days will not, in affiant's opinion, have any appreciable effect, adverse or otherwise. The time required for arranging the details of producing the program and the fact that in most instances a program to be broadcast during a given year, usually beginning in the fall, is actually contracted for more than 56 days in advance of its commencement or its renewal, will make adjustment to the new requir-ment a very simple matter involving no real inconvenience. Nothing in Regulation 3.104 prevents a station from accepting a network commercial program offered it on less than 56 days' notice.

7. *The apprehended "advertising super-network."* Of the various chimaeric alarms which have been conjured up to incite opposition to the Commission's Regulations, the apprehended "advertising super-network" is the most fantastic. Among the obstacles which eliminate this as a practical possibility are

a) the tremendous and uneconomic expense of leasing the necessary wire-lines (including the greatly increased pro-

portionate expense involved in leasing wire-lines for short periods weekly), and the difficulty of securing such lines reaching many important and indispensable markets,

b) the fact that such a network, in order to hold its affiliates and justify its continued existence, would have to provide a sustaining program service for its affiliates, with attendant expenses in studio, equipment, staff, engi- [fol. 306] neering, promotion and publicity, all at a disproportionate cost,

c) the fact that on almost all the stations that would be necessary to constitute such a network, virtually all their desirable hours are now in actual use either for network commercial programs, or for non-network commercial programs (local or national spot), providing a greater revenue than could possibly be provided by the "super-network" advertisers,

d) the unwillingness of the owners of stations such as would be necessary to constitute such a network, to deal or affiliate themselves with any transient or fly-by-night venture, or any venture having an adverse effect upon the stations' total revenue.

The fact that no attempt has been made in the past to set up such a network, either in the period prior to 1935 when National had no exclusivity provisions and only inconsiderable option-time provisions in its contracts, or since 1935 during hours not subject to option or, if subject, not actually used, demonstrates that it is not a reasonable possibility. To add to the unlikelihood that the possibility has any practical significance, affiant points to the fact that the 64-station hook-up suggested for such a purpose in Exhibit I attached to Mr. Trammell's affidavit, includes, as nearly as affiant can calculate, 44 stations which are now affiliated with National's Red Network, 15 stations which are now affiliated with Columbia, and 5 stations which are now affiliated with National's Blue Network. In other words, even in the present state of affairs, National's Red Network comes very close to being the apprehended "super-network", and, if present tendencies are permitted to continue under the restrictive contracts, National's Red Network and Columbia will actually constitute such network,

to the disadvantage and eventual exclusion of all effective competitors.

8. *Apprehended diversion of advertising to other media.* The apprehension asserted in behalf of National and Columbia that the Regulations will result in diversion of advertising from radio to other media, is without foundation. As already pointed out, so far as clearance of time over affiliate stations serves any legitimate need or convenience, it is permitted by the Regulations, and the advertiser, once [fol. 307] having contracted through a network for a given period of time over a specified list of stations, will be assured (to a much greater extent than at present in the case of Mutual and to the same extent as at present in the case of National and Columbia) of continued use of the time for the period of his contract. The effectiveness of radio as a medium to reach the public cannot possibly be impaired, and should be enhanced, by enforcing the Regulations.

9. *Apprehended elimination or impairment of sustaining program service.* The charge that enforcement of the Regulations will result in elimination or impairment of sustaining program service by the networks is directly contrary to fact. To be successful in competition with other networks, each network must offer its affiliates, and through them the public, a continuous sustaining program service of excellent character and embracing varied features. The shortcomings of any one network in this respect will inevitably be reflected in loss of audience and public favor, in loss of the better affiliates in each city, and in eventual loss of the patronage of advertisers, to the advantage of such network's competitors.

10. *No adverse effect from two-year limitation on length of contracts.* Affiant is unable to perceive or anticipate any adverse effect on any network from Regulation 3.103, placing a two-year limitation on the contracts between networks and affiliates, as distinguished from the five-year term now prevailing, *except* that, in the course of competition between networks for affiliates, a shorter term may eventually conduce toward bringing about more frequent adjustments of the rate of compensation paid by the network to the station so as to provide the station with a more nearly fair and adequate share of the profits of network broadcasting. This, however, will be a slow process in any

event and will not be particularly marked or substantial during the next two years.[19]

11. *General.* Over and above what affiant has already stated, affiant repeats and emphasizes the fact that, for the [fol. 308] usual business year in broadcasting, from September to September, virtually all business that is likely to be placed on national networks has already been placed (except for occurrences such as have already been pointed out, consisting of National's practices under its contracts and their effect on Mutual's programs). Except in the case of Mutual, where the effect is salutary, the Regulations have, and can have, no effect on existing network business for the duration of current contracts with advertisers (therefore, until September, 1942). Assertions such as are made by Mr. Trammell in his affidavit (pages 19, 21) or by Mr. Paley in his affidavit (pages 34-35) that the Regulations, either taken together or separately, will "destroy the present structure of network broadcasting" are absurd in view of the known and undisputed facts.

Fred Weber.

Subscribed and sworn to before me this 11th day of December, 1941. Edward H. Grohs, Notary Public. N. Y. County, N. Y. Co. Clk's. No. 507, Reg. No. 3972. Term expires March 30, 1943. (Seal.)

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[19] In this connection it should be noted, with reference to two of the affidavits filed by National, the contract of WOW, Omaha, with National expired December 2, 1941, and the contract of WHAM, Rochester, with National will expire February 1, 1942.

[fol. 800]

Appendix A

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
WOR	New York, N. Y.	11,690,520		50,000	50,000	710	Unlimited
WGN	Chicago, Ill.	4,499,126		50,000	50,000	720	"
WIP	Philadelphia, Pa.	2,898,644		5,000	5,000	610	"
CKLW	Detroit—Windsor, Mich.	2,296,867		5,000	5,000	800	"
WLOL	Minneapolis-St. Paul, Minn.	911,077		1,000	1,000	1,330	"
WHK	Cleveland, Ohio	1,214,943	N.B.C. Blue	5,000	5,000	1,420	"
WCLE	Cleveland, Ohio	1,214,943		500	.....	610	Daytime
WOL	Washington, D. C.	907,816		1,000	1,000	1,260	Unlimited
WFBR	Baltimore, Md.	1,046,602		5,000	5,000	1,300	"
KWK	St. Louis, Mo.	1,367,977		5,000	5,000*	1,380	"
WCAE	Pittsburgh, Pa.	1,994,060		5,000	5,000	1,250	"
WGR	Buffalo-Niagara, N. Y.	857,719		5,000	1,000	550	"
WKRC	Cincinnati, Ohio	789,309		5,000	1,000	550	"
KITE	Kansas City, Mo.-Kans.	634,093		1,000	1,000	1,590	"
WHB	Kansas City, Mo.-Kans.	634,093		1,000	.....	880	Daytime
WIBC	Indianapolis, Ind.	455,357		5,000	1,000	1,070	Unlimited
KFEL	Denver, Colo.	384,372		5,000	5,000	950	"
WSAY	Rochester, N. Y.	411,970		250	250	1,240	"
WHKC	Columbus, Ohio	365,796		500	.....	640	L-KFI
WAGE	Syracuse, N. Y.	258,352		1,000	1,000	620	Unlimited
WHBF	Rock Island-Davenport-Moline, Ill.-Ia.	174,995		5,000	5,000	1,270	"
KFOR	Lincoln, Neb.	88,191		250	250	1,240	"

APPENDIX A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
			COLONIAL STATIONS				
WAAB	Boston, Mass.	2,350,514		1,000	1,000	1,440	Unlimited
WEAN	Providence, R. I.	711,500	N.B.C. Blue	5,000	5,000*	790	*
WFCI	Pawtucket, R. I. Providence, R. I.	711,500		1,000	1,000	1,420	*
WTHT	Hartford, Conn. New Britain, Conn.	502,193		250	250	1,230	*
WELI	New Haven, Conn.	308,228		1,000	500	960	*
WSPR	Holyoke-Springfield, Mass.	394,623		500	500	1,270	*
WICC	Bridgeport, Conn.	216,621	N.B.C. Blue	1,000	500	600	*
WATR	Waterbury, Conn.	144,822		1,000*	1,000*	1,320	*
WNBH	Fall River-New Bedford, Mass.	272,648		250	250	1,340	*
WSAR	Fall River-New Bedford, Mass.	272,648		1,000	1,000	1,480	*
WLLH	Haverhill-Lowell-Lawrence, Mass.	334,969		250	250	1,400	*
WBRK	Pittsfield, Mass.	49,684		250	250	1,340	*
WCOU	Lewiston, Me.	38,596		250	250	1,240	*
WNLC	New London, Conn.	30,456		250	250	1,490	*
WSYB	Rutland, Vt.	17,082		1,000*	1,000*	1,380*	*
WHAI	Greenfield, Mass.	15,672		250	250	1,240	*
WLNH	Laconia, N. H.	13,484		250	250	1,340	*

KHJ	Los Angeles, Cal.	2,904,596		5,000	5,000*	930	Unlimited
KFRC	San Francisco-Oakland, Cal.	1,428,525		5,000	5,000	610	"
KOL	Seattle, Wash.	452,639		5,000	5,000*	1,300	"
KALE	Portland, Ore.	406,406		5,000	5,000	1,330	"
KGB	San Diego, Cal.	256,368		1,000	1,000	1,360	"
KGA	Spokane, Wash.	141,370	N.B.C. Blue	10,000*	10,000*	1,510	"
KMO	Tacoma, Wash.	156,018		5,000	5,000	1,360	"
KTKC	Visalia-Fresno, Cal.	97,504		5,000*	5,000*	940*	"
KPMC	Bakersfield, Cal.	29,252		1,000	1,000	1,600	"
KFXM	San Bernardino, Cal.	43,646		250	250	1,240	S-KPPC
KDB	Santa Barbara, Cal.	34,968		250	250	1,490	Unlimited
KIT	Yakima, Wash.	27,221		1,000	1,000	1,280	"
KVOE	Santa Ana, Cal.	31,921		250	250	1,490	"
KRKO	Everett, Wash.	30,224		250	100	1,400	"
KORE	Eugene, Ore.	20,838		250	250	1,450	"
KFJI	Klamath Falls, Ore.	16,497		100	100	1,240	"
KXRO	Aberdeen, Wash.	18,846		250	250	1,340	"
KIEM	Eureka, Cal.	17,055		1 000	500	1,480	"
KGY	Olympia, Wash.	13,254		100	100	1,240	"
KMYC	Marysville, Cal.	6,646		100	100	1,450	"
KYOS	Merced, Cal.	10,135		250	.....	1,080	Daytime
KXO	El Centro, Cal.	10,017		100	100	1,490	Unlimited
KHSL	Chico, Cal.	9,287		1,000	1,000*	1,290	"
KVEC	San Luis Obispo, Cal.	8,681		250	250	1,230	"

(fol. 312)

APPENDIX A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
KDON	Monterey, Cal.	10,084		250*	250*	1,240	Unlimited
KVCV	Redding, Cal.	8,109		250	250	1,230	"
KOOS	Marshfield, Ore.	5,269		250	250	1,230	"
KWLK	Longview, Wash.	12,385		250	250	1,480	"
KRNR	Roseburg, Ore.	4,924		250	250*	1,490	"
KELA	Centralia, Wash.	7,414		1,000	1,000	1,470	"
KWIL	Albany, Ore.	5,654		250	250	1,240	"
KAST	Astoria, Ore.	10,389		250	250	1,230	"
			Northeast Group				
WJW	Akron, Ohio	349,705		250	250	1,240	"
WABY	Albany, N. Y.	431,575		250	250	1,400	"
WILM	Wilmington, Del.	188,974		250	250	1,450	"
WARM*	Wilkes-Barre-Scranton, Pa.	629,581		250	250	1,400	"
WHBC	Canton, Ohio	200,352		250	250	1,230	"
WKBO	Harrisburg, Pa.	173,367	N.B.C. Red, Blue	250	250	1,230	"
WNBF	Binghamton, N. Y.	145,156	C.B.S.	5,000*	5,000*	1,260*	"
WBAX	Wilkes-Barre-Scranton, Pa.	629,581		100	100	1,240	"
WGAL	Lancaster, Pa.	132,027	N.B.C. Red, Blue	250	250	1,490	"
WORK	York, Pa.	92,627	N.B.C. Red, Blue	1,000	1,000	1,350	"
WENY	Elmira, N. Y.	45,106		250	250	1,230	"
WSTV	Steubenville, Ohio	37,651		250	250	1,340	"
WEST	Easton, Pa.	33,589		250	250	1,400	"
WLBZ	Bangor, Me.	29,822	N.B.C. Red, Blue	5,000*	5,000*	620	"
WEIM*	Fitchburg, Mass.	41,824		250	250	1,340	"
WPAY	Portsmouth, Ohio	40,466		250*	250*	1,400	"
WJEJ	Hagerstown, Md.	32,491		250	250	1,240	"

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WAZL	Hazleton, Pa.	38,009		250	250	1,450	Unlimited
WRDO	Augusta, Me.	19,360	N.B.C. Red, Blue	100	100	1,400	"
WFEA	Manchester, N. H.	77,685	N.B.C. Red	5,000*	5,000*	1,370	"
			Mid-West Group				
KOIL	Council Bluffs-Omaha, Ia.-Neb.	287,608	C.B.S.	5,000	5,000	1,290	"
KRO	Des Moines, Ia.	183,973	N.B.C. Blue	5,000	5,000*	1,460	"
WLAV	Grand Rapids, Mich.	209,873		250	250	1,340	"
KFBI	Wichita, Kans.	127,308		5,000	1,000	1,070	"
WROK	Rockford, Ill.	105,259		1,000	500	1,440	"
KGHI	Little Rock, Ark.	126,724		250	250	1,230	"
WMT	Cedar Rapids, Ia.	73,219	C.B.S.	5,000	5,000	600	"
KDTH	Dubuque, Ia.	43,892		1,000	1,000	1,370	"
KSAL	Salina, Kans.	21,073		1,000	1,000	1,150	"
KOTN	Pine Bluff, Ark.	21,290		250	250	1,490	"
KWFC	Hot Springs, Ark.	21,370		250	250	1,340	"
KWOS	Jefferson City, Mo.	24,268		250	250	1,240	"
KTSW	Emporia, Kans.	13,188		250	250	1,400	"
KGGF	Coffeyville, Kans.	17,355		1,000	500	600	"
KBTM	Jonesboro, Ark.	11,729		250	100	1,230	"
KMA	Shenandoah, Ia.	6,846	N.B.C. Blue	5,000	1,000	960	"
KVGB	Great Bend, Kans.	9,044		250	250	1,400	"
			Southeast Group				
WRNL	Richmond, Va.	245,674	N.B.C. Blue	5,000*	5,000*	910	"
WGH	Portsmouth-Newport News-Norfolk, Va.	323,326		250	250	1,340	"

APPENDIX A—Continued

[fol. 311]

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
WSOC	Charlotte, N. C.	112,986	N.B.C. Red	250	250	1,240	Unlimited
WSLS	Roanoke, Va.	110,593		250	250	1,490	"
WCOS	Columbia, S. C.	89,555	N.B.C. Blue	250	250	1,400	"
WCMI	Huntington-Ashland, W. Va.-Ky.	170,979		250	250	1,340	"
WAIR	Winston-Salem, N. C.	109,833		250	250	1,340	"
WMRC	Greenville, S. C.	34,734		250	250	1,490	"
WRAL	Raleigh, N. C.	46,897		250	250	1,240	"
WLVA	Lynchburg, Va.	44,541		250	250	230	"
WBTM	Danville, Va.	32,749		250	250*	1,400	"
WSTP	Salisbury, N. C.	19,037		250	250	1,490	"
WBBB	Burlington, N. C.	12,198		1,000	.....	920	Daytime
			Southern Group				
WATL	Atlanta, Ga.	442,294		250	250	1,400	Unlimited
WNOE	New Orleans, La.	540,030		250	250	1,450	"
WMPS	Memphis, Tenn.	332,477	N.B.C. Blue	1,000	500	1,460	"
WGRC	Louisville, Ky.	434,408		250	250	1,400	"
WSGN	Birmingham, Ala.	407,851	N.B.C. Blue	1,000	1,000	610	"
WSIX	Nashville, Tenn.	241,769		5,000*	5,000*	980*	"
WJHP	Jacksonville, Fla.	195,619	N.B.C. Blue	250	250	1,320	"
WDEF	Chattanooga, Tenn.	133,215		250	250	1,400	"
WBIR	Knoxville, Tenn.	151,829		250	250	1,240	"
WTSP	St. Petersburg-Tampa, Fla.	209,693		1,000	500	1,380	"
WGBF	Evansville, Ind.	141,614	N.B.C. Red, Blue	5,000	1,000	1,280	"

[fol. 315]

WLAP	Lexington, Ky	49,304		250	250	1,450	Unlimited
WMOB	Mobile, Ala	114,906		250	250	1,230	"
WBML	Macon, Ga	74,830		250	250	1,240	"
WJBY	Gadsden, Ala	36,975		250	250	1,240	"
WTJS	Jackson, Tenn	24,332		1,000*	1,000*	1,390	"
WALB	Albany, Ga	19,055		1,000	1,000	1,500	"
WRUF	Gainesville, Fla	13,757		5,000	.....	850	L-KOA
WHBB	Selma, Ala	19,834		100	100	1,490	Unlimited
WMSL	Decatur, Ala	16,604		250	250	1,400	"
WBLJ	Dalton, Ga	10,448		250	250	1,230	"
WDAK	West Point, Ga	3,591		250	250	1,340	"
			Southwest Group				
KXYZ	Houston, Tex	510,397	N.B.C. Blue	5,000*	5,000*	1,320*	"
WRR	Dallas, Tex	376,548		5,000*	5,000*	1,310	"
KABC	San Antonio, Tex	319,010		250	250	1,450	"
KFJZ	Fort Worth, Tex	207,677		5,000*	5,000*	1,270	"
KOCY	Oklahoma City, Okla	221,229		250	250	1,340	"
KOME	Tulsa, Okla	188,562	N.B.C. Blue	250	250	1,340	"
KNOW	Austin, Tex	106,198		250	250	1,490	"
KRIS	Corpus Christi, Tex	70,677	N.B.C. Red, Blue	1,000	1,000	1,360	"
KPAC	Beaumont-Port Arthur, Tex	138,608		500	500	1,250	"
KFDA	Amarillo, Tex	53,463		250	250	1,230	"
WACO	Waco, Tex	71,114		250	250	1,450	"
KGKL	San Angelo, Tex	25,802		250	250	1,400	"

APPENDIX A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
KCMC	Texarkana, Tex.	28,840		250	250	1,450	Unlimited
KRBC	Abilene, Tex.	26,612		250	250	1,450	"
KBST	Big Spring, Tex.	12,604		100	100	1,490	"
KRRV	Sherman, Tex.	17,156		1,000	1,000	910	"
KTEM	Temple, Tex.	15,344		250	250	1,400	"
KRGV	Weslaco, Tex.	6,883	N.B.C. Red, Blue	1,000	1,000	1,290	"
			Northwest Group				
WHBL	Sheboygan, Wis.	40,366		1,000*	1,000*	1,330	"
WHBY	Appleton, Wis.	28,436		250	250	1,230	"
WFHR	Wisconsin Rapids	11,416		250	250	1,340	"
KFIZ	Fond Du Lac, Wis.	27,209		250	250	1,450	"
WSAU	Wausau, Wis.	27,268		250	250	1,400	"
WHDF	Calumet, Mich.	Under 5,000		250	250	1,400	"
WDSM	Duluth-Superior, Minn.-Wis.	157,098		100	100	1,220	"
KTRI	Sioux City, Ia.	87,791		250	250	1,450	"
KVOX	Fargo-Moorhead, N. D.	42,071		250	250	1,340	"
KVFD	Ft. Dodge, Ia.	22,904		250	250	1,400	"
KWNO	Winona, Minn.	22,490		250	250	1,220	"
KGCU	Bismarck-Mandan, N. D.	22,181		250	250	1,270	"
KABR	Aberdeen, S. D.	17,015		5,000	5,000	1,420	"
KLPM	Minot, N. D.	16,577		1,000	1,000	1,390	"
KATE	Albert Lea, Minn.	12,200		250	250	1,450	"
KGDE	Fergus Falls, Minn.	10,548		250	100	1,230	"
KRMC	Jamestown, N. D.	8,790		250	250	1,400	"

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KDLR	Devils Lake, N. D.	6,204		250	250	1,240	Unlimited
KWLM	Willmar, Minn.	7,623		250	250	1,340	"
WJMS	Ironwood, Mich.	13,360		250	250	1,450	"
WATW	Ashland, Wis.	11,101		100	100	1,400	"
			Mountain Group				
KLO	Ogden-Salt Lake City, Utah	204,488	N.B.C. Blue	5,000	5,000	1,430	"
KFXJ	Grand Junction, Colo.	12,479		1,000*	500*	920*	"
KFKA	Greeley, Colo.	15,995		1,000	1,000	910	S-KPOF
KOVO	Provo, Utah	18,071		250	250	1,240	Unlimited
KEUB	Price, Utah	5,214		250	250	1,450	"
			Group Outside United States				
KGMB	Honolulu, T. H.			5,000	5,000	590	"
KHBC	Hilo, T. H.			250	250	1,230	"
KGBU	Ketchikan, Alaska			500	500	930	"
CKLW	Windsor, Ontario (Previously listed)						

* Construction permit only.

NOTE: The affiliations and facilities above listed are corrected to November 1, 1941. City populations based on 1940 census figures, metropolitan district figures used whenever applicable. Affiliations based upon November 1, 1941 edition of Standard Rate and Data, except Mutual, whose affiliations are based upon its own files.

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Appendix B

Comparison of Facilities of Broadcast Stations Affiliated with the Four National Networks

(As of November 1, 1941)

Full-time Stations

	Size of City	National (Red)	National (Blue)	Columbia	Mutual
Clear Channel 50 kw.	1,000,000 up	9[1]	3[2]	6	2
	500,000 "	3	1	6	..
	100,000 "	6	3	8	..
	25,000 "	1	1	..	..
		19	8[3]	20	2
Clear Channel below 50 kw.	1,000,000 up	..	2	..	..
	500,000 "	..	..	..	..
	100,000 "	1	5	5	3
	25,000 "	1	..	2	1
	10,000 "	..	1	..	1
		2[4]	8[4]	7	5[5]
Regional (1 kw. to 5 kw.)	1,000,000 up	3	6	5	8
	500,000 "	8	7	5	8
	100,000 "	28	22	34	19
	25,000 "	16	20	20	9
	10,000 "	4	5	4	9
	5,000 "	..	2	1	4
	5,000 down	1	..	..	..
		60[6]	62[6]	69	57[7]
Regional (less than 1 kw. at night)	1,000,000 up	..	..	..	..
	500,000 "	..	..	..	..
	100,000 "	2	5	..	7
	25,000 "	2	2	..	..
	10,000 "	1	2	..	1
		5[8]	9[8]	..	8[9]
Local (100 w. to 250 w.)	1,000,000 up	..	1	..	..
	500,000 "	1	3	..	4
	100,000 "	11	12	8	24
	25,000 "	8	24	6	35
	10,000 "	12	16	6	30
	5,000 "	2	4	..	10
	5,000 down	1	1	..	3
		35[6]	61[6]	20	106[10]

[fol. 319] APPENDIX B—Continued

Comparison of Facilities of Broadcast Stations Affiliated with the Four National Networks

(As of November 1, 1941)

Part-time Stations

	Size of City	National (Red)	National (Blue)	Columbia	Mutual
Clear Channel 50 kw.	100,000 up	1	..	..	..
		1	..	..	..
Clear Channel below 50 kw.	500,000 up	..	..	..	1
	100,000 "	..	1	..	1
	25,000 "	1	1	..	..
	10,000 "	1	1	1	2
		2[3]	3[3]	1	4
Regional (1 kw. to 5 kw.)	1,000,000 up	..	..	..	1
	500,000 "	..	1	1	..
	100,000 "	..	..	..	..
	25,000 "	..	..	1	..
	10,000 "	..	..	..	2
		..	1	2	3
Regional (less than 1 kw. at night)	1,000,000 up	..	..	..	..
	500,000 "	..	..	..	..
	100,000 "	1	1	..	..
		1[4]	1[4]	..	..
Local (100 w. to 250 w.)	25,000 up	..	..	..	1
		..	..	..	1
Total		125	153	119	186

[1] WFAA–WBAP treated as one full-time station.
[2] WENR–WLS treated as one full-time station.
[3] Includes 2 stations affiliated with both Red and Blue.
[4] Includes 1 station affiliated with both Red and Blue.
[5] Includes 1 station primarily affiliated with N.B.C. Blue.
[6] Includes 19 stations affiliated with both Red and Blue.
[7] Includes 3 stations primarily affiliated with Columbia, 4 with both N.B.C. Red and Blue, 7 with N.B.C. Blue, and 2 with N.B.C. Red.
[8] Includes 4 stations on both N.B.C. Red and Blue.
[9] Includes 3 stations primarily with N.B.C. Blue.
[10] Includes 3 stations primarily affiliated with both N.B.C. Red and Blue, 3 with N.B.C. Blue, and 1 with N.B.C. Red.

Note.—Only stations within continental United States are considered. Population figures based upon 1940 census, with metropolitan districts used when applicable. Classifications include facilities authorized by construction permit only.

[fol. 320] APPENDIX C

Affiant's Letter to Mutual Stockholders, October 31, 1941

Mutual Broadcasting System, Inc.

New York Office: 1440 Broadway, New York

October 31, 1941.

To: Stockholders of the Mutual Broadcasting System:

As you are aware, the Monopoly Regulations of the Federal Communications Commission become effective on November 15, 1941. In view of the short time remaining before that effective date, we send you herewith a letter agreement modifying your existing contract with Mutual, and request that you immediately execute it and return it to us.

We are at present preparing new contracts which will embody the various changes required by the Monopoly Regulations, as well as other changes which have been discussed at our Board of Directors Meetings. These contracts will be submitted to you as soon as possible, after which the date of the next meeting of the Board of Directors will be advised.

Your cooperation in immediately returning the enclosed agreement, signed by you, to our Chicago office, attention of Mr. E. M. Antrim, will be greatly appreciated.

With kindest regards, Fred Weber.

FW:mk
Enc.

APPENDIX D

Mutual's Agreement with its Stockholders, October 31, 1941

Mutual Broadcasting System, Inc.

Branch Office: 1440 Broadway, New York

October 31, 1941.

GENTLEMEN:

Confirming the understanding between us, it is agreed that notwithstanding anything to the contrary contained in the contract between you and the Mutual Broadcasting System, Inc.,

[fol. 321] (1) The option time referred to in said contract shall be exclusive, except as against other network organizations, it being understood that notwithstanding such option time, you will not be prevented or hindered from optioning (under non-exclusive options) or selling any or all of said option time, or other time, to other network organizations. You will clear and furnish to Mutual any period or periods of time within said option time for broadcasting of any Mutual commercial network program or programs upon fifty-six (56) days' notice from Mutual, unless prior to such notice from Mutual you shall have actually made a bona fide sale to another network organization of the period or periods of time within said option time required by Mutual for the advertiser. No commitment to any other network organization made in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission shall be deemed to be a bona fide sale for the purpose of this paragraph. You may refuse to execute a commitment to furnish broadcasting time to Mutual for the broadcasting of any program or programs which you reasonably believe to be unsatisfactory or unsuitable.

(2) The provisions of said contract with regard to your exclusive association with Mutual is hereby revoked and rescinded.

(3) Any other provisions of said contract in violation of Section 3.101,-3.108 both inclusive of the Regulations of the Federal Communications Commission is hereby revoked and rescinded.

The provisions of this letter shall become effective immediately.

Except as herein specifically modified, said contract shall continue in full force and effect.

If the provisions of this letter meet with your approval will you please indicate your assent thereto by affixing your signature on each of the enclosed copies of this letter and return to our Chicago Office, attention of Mr. E. M. Antrim.

Yours very truly, Mutual Broadcasting System, Inc.,
by Fred Weber, General Manager.

FW:pwh.
Approved ———.
Date ———.

[fol. 322] APPENDIX E

Mutual's Proposed Contract to Conform to the Revised Regulations

This Agreement, made at Chicago, Illinois, as of ——, 194—, between Mutual Broadcasting System, Inc., an Illinois corporation (hereinafter called "Mutual"), and —— (hereinafter called the "Broadcaster"),

Witnesseth:

The Broadcaster is the owner and operator of radio station ——, located at —— (hereinafter called the "Station").

Mutual is engaged in the operation of a national radio broadcasting network composed of stations which are owned or operated by or affiliated with Mutual's shareholders and of other stations which are from time to time affiliated with the Mutual network. It is the intention of Mutual and the Broadcaster that the network shall remain cooperative in character, and that the stations composing the network shall retain the advantages thereof, including: effective control on the part of such stations of the acceptance or rejection of programs to the end that the public interest may be best served, full participation in the profits of network operation, the preservation of local control and ability to meet local and regional needs in the public interest, the greater geographical diversification of program-originating points, the prevention of tendencies toward monopoly and toward concentration of program control in a small group or in a particular locality, and the furtherance of the principle of competition.

The Broadcaster and Mutual are desirous of entering into an agreement, on the terms and conditions hereinafter set forth, for the affiliation of the Station with the Mutual network and for the sale by the Broadcaster and the purchase by Mutual of broadcasting time on the Station for the broadcasting of Mutual network commercial programs.

Now, Therefore, It Is Mutually Agreed as Follows:

1. Mutual will contract with the American Telephone and Telegraph Company for the maintenance by the latter, commencing on ——, 194—, of a program transmission line extending to ——.

[fol. 323] 2. Mutual and the Broadcaster will each publicize the Station as the regular Mutual outlet in the city in which the Station is located. The Station shall have the right to the first call on Mutual network commercial and sustaining programs in said city and Mutual shall not offer any series of programs or single program (not a part of a series) to any other radio station located in said city unless said series of programs or single program has been offered to the Broadcaster for broadcasting through the Station under this contract and the Broadcaster shall have failed or refused to accept such program or programs within forty-eight (48) hours after Mutual's offer.

(A) In the case of a commercial program or a series of commercial programs:

(1) If the Broadcaster is unable to clear the required period or periods of time on the Station for such program or programs but notifies Mutual within said 48 hours that the Broadcaster can clear a mutually satisfactory substitute period or periods and is able and willing to broadcast the program or programs by means of off-the-line recordings (made by the Broadcaster without cost to Mutual or the advertiser) during such substitute period or periods, Mutual will accept such substitute period or periods, unless the advertiser is unwilling to accept such broadcasting by the Station by means of off-the-line recordings during such substitute period or periods, it being understood that Mutual is not obligated to require the advertiser to accept such delayed broadcasting; and

(2) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs scheduled to run for thirteen weeks or more or a series of separable programs, but notifies Mutual within said 48 hours that the Broadcaster will clear said periods of time upon a specified date not later than four (4) weeks after the commencement of the series of programs, Mutual will contract for such periods of time on the Station as of the specified date upon which the Broadcaster is able to clear such periods, unless the advertiser refuses to accept such postponement of broadcasting on the Station.

If the Broadcaster fails or refuses to accept said program or programs or if the Broadcaster is unable to clear

the required period or periods of time and Mutual is unable [fol. 324] to persuade the advertiser to use a substitute period or periods or to postpone the commencement of such programs on the Station, as provided in the preceding subparagraphs, Mutual may contract with any other station located in said city for the broadcasting of said commercial program or programs.

(B) In the case of a single sustaining program or series of sustaining programs:

(1) If the Broadcaster is unable to clear the required period or periods of time for such program or programs but notifies Mutual that the Broadcaster will broadcast the program or programs by transcription at a mutually satisfactory substitute period or periods, Mutual will not offer said program or programs to any other station in said City; and

(2) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs, Mutual, in offering said series of programs to any other station in said city, will offer said series subject to recapture by the Station on one (1) week's notice to Mutual.

It is understood, however, that notwithstanding the foregoing, Mutual may make available to any other station in said city special sustaining programs of great public importance (such as, but not limited to, addresses of the President of the United States).

3. Mutual will use its best efforts to secure contracts from advertisers for the broadcasting of commercial programs through the Station, as well as through all other stations regularly affiliated with Mutual, but Mutual does not undertake to refuse any commercial programs simply because the advertiser refuses to purchase coverage in the city in which the Station is located. The Broadcaster will sell broadcasting time on the Station to Mutual for broadcasting commercial programs, and will broadcast such programs through the Station, on the following terms and conditions:

(A) The Broadcaster hereby grants to Mutual an option on the periods of time on the Station specified in Exhibit A hereto attached, hereinafter called the "Mutual option time". This option shall be exclusive, except as against

other network organizations, it being understood that the granting of this option to Mutual shall not prevent or hinder the Broadcaster from optioning (under nonexclu-
[fol. 325] sive options) or selling any or all of the Mutual option time, or other time, to other network organizations. The Broadcaster will clear and furnish to Mutual any period or periods of time within the Mutual option time for the broadcasting of any Mutual commercial network program or programs upon fifty-six (56) days' notice from Mutual, unless prior to such notice from Mutual the Broadcaster shall have actually made a bona fide sale to another network organization of the period or periods of time required by Mutual for the advertiser. No commitment to any other network organization made in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission shall be deemed to be a bona fide sale for the purpose of this contract. The Broadcaster may refuse to execute a commitment to furnish broadcasting time to Mutual for the Broadcasting of any program or programs which the Broadcaster reasonably believes to be unsatisfactory or unsuitable. (Mutual will use its best efforts to supply to the Broadcaster such information as it may request regarding any proposed program or programs.)

(B) If the period or periods of time on the Station required for broadcasting any Mutual network commercial program or programs are outside the Mutual option time and if the Broadcaster elects to sell such required period or periods of time to Mutual for the broadcasting of such program or programs, such time shall be sold to Mutual on the terms and conditions contained in the following subparagraphs of this paragraph, i.e., on the same terms and conditions as time within the Mutual option time is sold to Mutual.

(C) Mutual will charge each advertiser at the following rates, for broadcasting time on the Station furnished to such advertiser by Mutual:

(1) In order to encourage the use by advertisers of a greater number of stations affiliated with Mutual for the broadcasting of the advertiser's program, Mutual has established special competitive volume discounts for advertisers contracting for periods of time on a substantial num-

ber of such stations. The minimum number of stations which must be used to entitle the advertiser to such special volume discounts is, at present, 76 stations, but it is understood that Mutual may increase or decrease this minimum from time to time, if Mutual finds it necessary or desirable to do so to meet competitive conditions. Accordingly, [fol. 326] if any advertiser contracts with Mutual for periods of time on at least the number of stations then specified by Mutual as the minimum number of stations necessary to entitle the advertiser to such special volume discounts, Mutual will charge the advertiser for time on the Station at a Volume Network Rate equal to the Station's single-time rate for the period of time used on any day, in the applicable time classification, less the applicable special volume discount specified below, depending upon the number of programs broadcast by Mutual for the advertiser during a period of fifty-two consecutive weeks:

13 broadcasts—20% discount
26 broadcasts—25% discount
52 broadcasts—35% discount
104 broadcasts—40% discount
156 broadcasts—42½% discount
208 broadcasts—45% discount
260 broadcasts—50% discount

No such special volume discount, however, will be allowed to any advertiser with respect to time purchased by the Advertiser under any contract for a term of less than thirteen consecutive weeks. In computing the Volume Network Rate for the programs of any advertiser, the Station's single-time rates will be deemed to be the Station's published card rates for national advertisers in effect on the date the Broadcaster executes its commitment in connection with such advertiser's programs, or the single-time rates then charged or quoted by the Broadcaster to national advertisers for time on the Station, if such rates are lower than the Station's published card rates. (It is understood that if the advertiser uses two or more fifteen-minute units on any day, the total daily amount of time used by the advertiser may, for the purpose of determining the single-time rate to be used in computing the charges to the advertiser, be treated as an uninterrupted period, and, if two or more fifteen-minute units used by the advertiser

fall in different time classifications, the single-time rates in such classifications will be averaged. Any advertiser that shall have completed two hundred sixty broadcasts during a period of fifty-two successive weeks of broadcasting at the Volume Network Rate and shall continue such broadcasting without interruption shall be entitled to receive the Volume Network Rate for 260 broadcasts for the additional [fol. 327] period of successive weeks during which the advertiser uses the same periods of time.

(2) Mutual will charge any other advertiser for time on the Station at the Station's rates for such time in effect on the date the Broadcaster executed a commitment in connection with such advertiser's program or programs, less the applicable discounts customarily allowed by the Broadcaster to advertisers.

These rates will, of course, be subject to the customary 15% agency commission to recognized advertising agencies. The term "advertiser" as used in this contract shall mean the advertiser or the advertising agency signing a contract for an advertiser, as the case may be.

(D) Mutual will pay the Broadcaster for all broadcasting time used by Mutual on the Station a net sum equal to Mutual's actual receipts from advertisers for such time, at the rates specified in paragraph (A) above, less the sum of the following:

(1) —% of such receipts from advertisers;

(2) Line and service charges of $——— per month;

( ) License fees payable by Mutual to the American Society of Composers, Authors and Publishers and other copyright licensing organizations with respect to the broadcasting through the Station of Mutual commercial and sustaining network programs.

If Mutual is, for any reason, unable to collect the entire amount billed to any advertiser (or its advertising agency) for broadcasting time on all participating stations, the receipts for time on the Station will, of course, be deemed to be a pro rata share of the amount actually collected, the share to be allocated to the Broadcaster depending upon the number of stations broadcasting said programs, the respective time charges of such stations, and the interrup-

tions and appropriations occurring with respect to said programs.

(E) Mutual will furnish a monthly statement to the Broadcaster on or before the last day of each month setting forth the above accountings with respect to the preceding month, and will accompany such statement with the sum, if any, due the Broadcaster.

(F) The Broadcaster will sign a commitment in the form attached hereto in connection with each advertiser's pro- [fol. 328] gram or programs submitted by Mutual and accepted by the Broadcaster and, when Mutual consummates its contract with the advertiser, Mutual will sign and return the commitment to the Broadcaster. Unless Mutual gives the Broadcaster written notice that it desires to terminate the commitment, any commitment (for the sale by the Broadcaster and the purchase by Mutual of time on the Station) which is in force at the date of the termination of this contract shall not be affected in any manner by such termination of this contract, except that thereafter Mutual, in computing its payments to the Broadcaster for such time, shall only be entitled to deduct from Mutual's receipts for such time the percentages and license fees specified in paragraph (D) above, and the actual cost of the temporary line facilities necessary to deliver the advertiser's programs to the Broadcaster.

(G) Notwithstanding the execution of a commitment by the Broadcaster to broadcast any advertiser's program or programs as hereinabove provided, the Broadcaster may refuse to broadcast any such program which, in its opinion, is contrary to the public interest or the Broadcaster may substitute for any such program a program of outstanding local or national importance. The Broadcaster will give Mutual as much notice of the Broadcaster's intention to refuse any program or to substitute another program as circumstances permit.

(H) If for any reason the Broadcaster shall enter into a contract with any advertiser for the broadcasting of any Mutual program (i.e., a program being transmitted over the Mutual lines) under the provisions of which the Broadcaster, instead of Mutual, shall receive the payments made by the advertiser for broadcasting time on the Station, the receipts of the Broadcaster from such advertising shall

(for the purpose of determining the amount of the deductions provided in paragraph (D) above, but for no other purpose) be deemed a part of Mutual's receipts from advertisers for broadcasting time on the Station.

4. If Mutual's receipts from advertisers for time on the Station for any month shall not equal the sum of the deductions provided in paragraph (D) above for such month, the Broadcaster will pay Mutual the deficiency promptly upon the receipt of a statement from Mutual of such deficiency. To secure the prompt payment of any such deficiencies, the Broadcaster will maintain the sum of $—— [fol. 329] on deposit with Mutual. Such deposit, if not theretofore exhausted, shall be applied to the payment of any deficiency for the last month of this contract. Any portion of such deposit not so applied shall be refunded to the Broadcaster by Mutual upon the termination of this contract.

5. Mutual agrees to use its best efforts to obtain from its various affiliated stations and to otherwise develop sustaining programs of high quality, including: broadcasts of national and international events, speeches by national and international figures in the fields of government, education, religion, agriculture, and the arts, broadcasts of operas, symphony concerts, and other musical events, dramatic presentations and other educational or entertainment programs of general interest, for broadcasting by the stations composing its network. So long as the Broadcaster shall faithfully perform all of its agreements herein contained, Mutual will transmit to the Broadcaster for broadcasting by the Station such Mutual sustaining programs as may from time to time be transmitted over Mutual's Chicago —— line, unless Mutual is prevented from so doing by causes beyond its control, or unless such transmission might involve Mutual or the originating station in a labor dispute. The Broadcaster shall not, without the prior consent of Mutual, broadcast any of these programs as sponsored programs or in any other manner use any of these programs or permit them to be used for commercial purposes, shall not furnish any of these programs to any other station, shall not make any transcription or recording of any of these programs, except for delayed broadcasting on the Station, and shall not consent to the rebroadcasting of any of these

programs by any other station. The Broadcaster agrees to make available to Mutual, for transmission to the other stations affiliated with the Mutual network, the outstanding sustaining programs produced or developed by the Broadcaster.

6. The Broadcaster agrees that during the term of this contract it will not enter into any contract with any person, firm or corporation wherein the Broadcaster agrees to broadcast programs through the Station exclusively for any other network or wherein the Broadcaster gives such network any exclusive option on, or exclusive priority rights over, any broadcasting time on the Station. The Broad-
[fol. 330] caster further agrees that it will not discriminate against Mutual and in favor of any other network organization in the sale of its broadcasting time, in that, if it sells broadcasting time to any other network organization, it will, in acting upon requests for the same period of time from Mutual and such other network organizaiton, adhere to the principle of first-come-first-served. The Broadcaster further agrees that it will not make any commitment with respect to any period or periods of time on the Station to any other network organization in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission. If the Broadcaster shall enter into any contract or agreement with any other network organization or shall enter into any contract or agreement with any person, firm or corporation for the broadcasting of any program to be transmitted to the Station by any other network organization, the Broadcaster agrees to furnish Mutual with a true and complete copy of such contract or agreement within five (5) days after it is executed or made. The Broadcaster further agrees to give Mutual written notice of any sale of broadcasting time on the Station within the Mutual option time made to any other network organization, pursuant to any such contract or agreement. Such notice shall be given to Mutual by the Broadcaster within five (5) days after the commitment to furnish the broadcasting time is made by the Broadcaster and shall specify the period or periods of time to be furnished, the date or dates upon which such period or periods are to be furnished, the network organization to which such period or periods are to be furnished, the advertiser whose program or programs are to be broadcast during said period or periods and

the compensation to be received by the Broadcaster for said period or periods.

7. This agreement shall, unless sooner terminated as hereinafter provided, remain in effect for a period of —— years, ending —— —, 194—, and shall then be renewed on the same terms and conditions for a further period of —— years, and so on for successive further periods of —— years each, unless and until either party shall, at least —— days prior to the expiration of the then current term, give the other party written notice that it does not desire to have the contract renewed for a further period.

8. If any of the licensees of radio stations contributing to the cost of Mutual's program transmission line extend- [fol. 331] ing to —— —— shall cease to make such contributions, Mutual may give written notice to the Broadcaster of Mutual's desire to terminate this contract, such notice to be given by registered mail at least thirty (30) days prior to the date upon which Mutual proposes that the termination shall become effective. This contract will terminate on the effective date specified in Mutual's notice, unless the Broadcaster shall, within ten (10) days after the date of Mutual's notice, deliver to Mutual a binding agreement by the Broadcaster to pay to Mutual, during the remainder of the term of this contract, an additional amount each month equal to the contributions theretofore made by the licensee or licensees ceasing to make such contributions.

9. If the ownership or control of the Station or of the controlling interests in the capital stock of the Broadcaster shall be voluntarily or involuntarily transferred from its present holder or holders, Mutual may terminate this contract by giving written notice to the Broadcaster by registered mail at least thirty (30) days prior to the date upon which such termination is to become effective.

10. The Broadcaster agrees that it will not use the name "Mutual Broadcasting System" or any similar name, except pursuant to the terms and conditions of this contract and in a manner consistent with its provisions.

11. It is understood and agreed that neither of the parties is the agent or representative of the other for any purpose whatsoever and that no partnership relationship exists between the parties.

12. This agreement is subject to all present and future rules, regulations, and orders of the Federal Communications Commission and to all laws of the United States of America now or hereafter in force.

In Witness Whereof, the parties hereunto have executed this contract, or have caused it to be executed by their duly authorized officers, as of the day and year first above written, on the respective dates indicated after their signatures.

MUTUAL BROADCASTING SYSTEM, INC.
By .....
Date .....

By .....
Date .....

[fol. 332]

Appendix F

Summary of Available Full-Time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
Ten or More Full-time Commercial Stations					
New York, N. Y.[2]	11,690,520	1	6	14	3
Los Angeles, Cal.	2,904,596	3	8	13	4[3]
Nine Full-time Commercial Stations					
Chicago, Ill.[2]	4,499,126	2	5	9	5
San Francisco-Oakland, Cal.	1,428,525	9	8	9	3
Eight Full-time Commercial Stations					
Boston, Mass.[2]	2,350,514	5	6	8	3
Seven Full-time Commercial Stations					
Philadelphia, Pa.[2]	2,898,644	4	5	7	3
Six Full-time Commercial Stations					
Detroit, Mich.[2]	2,295,867	6	3[4]	6[4]	3
Washington, D. C.[2]	907,816	13	4	6	3
Kansas City, Kans.-Kansas City, Mo.[2]	634,003	18	5[5]	6[5]	3[5]
Seattle, Wash.	452,639	24	5	6	3
Five Full-time Commercial Stations					
Pittsburgh, Pa.[2]	1,994,060	7	4[6]	5	3
St. Louis, Mo.[2]	1,367,977	8	4	5	3
Baltimore, Md.[2]	1,046,692	11	3	5	3
Minneapolis-St. Paul, Minn.[7]	911,077	12	4	5	3
Buffalo-Niagara Falls, N. Y.[2]	857,719	14	3	5	4[3]
Cincinnati, O.[2]	789,309	16	4	5	3
New Orleans, La.	540,030	20	3	5	3

Portland, Ore.	406,406	30	4	5	3
Denver, Colo.	384,372	32	4	5	3
San Antonio, Tex.	319,010	42	2	5	2
Four Full-time Commercial Stations					
Providence, R. I.[9]	711,500	17	0[9]	4	3
Scranton-Wilkes-Barre, Pa.	629,581	19	0	4[10]	1[10]
Hartford-New Britain, Conn.[9]	502,193	22	2	4	3
Indianapolis, Ind.[9]	455,357	23	4	4	3
Atlanta, Ga.	442,294	25	3	4	3
Louisville, Ky.[11]	434,408	26	2	4	3
Albany-Schenectady-Troy, N. Y.[9]	431,575	27	1	4	3
Springfield-Holyoke, Mass.[12]	394,623	31	2	4	2
Dallas, Tex.	376,548	33	4[14]	4[14]	3[14]
Memphis, Tenn.	332,477	39	3	4	3
Syracuse, N. Y.[13]	258,352	48	4	4	2
Oklahoma City, Okla.	231,229	53	4	4	3
Tampa-St. Petersburg, Fla.	209,693	56	4	4	3
Fort Worth, Tex.	207,677	57	4[14]	4[14]	3[14]
Tacoma, Wash.	156,018	76	2	4	0
Spokane, Wash.	141,370	84	3	4	3

APPENDIX F—Continued

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations[2]	Number of stations owned by or affiliated with Columbia and National
Three Full-time Commercial Stations					
Cleveland, O.[3]	1,214,943	10	3	3	3
Milwaukee, Wis.	790,336	15	3	3	3
Houston, Tex.	510,397	21	3	3	3
Rochester, N. Y.[4]	411,970	28	2	3	2
Birmingham, Ala.	407,851	29	2	3	2
Youngstown, O.	373,428	34	2	3	2
Akron, O.[5]	349,705	36	2	3	2
Worcester, Mass.[6]	306,194	44	2	3	2
Omaha-Council Bluffs, Nebr.-Ia.[7]	287,698	45	2	3	2
San Diego, Cal.	256,368	49	3	3	1
Miami, Fla.	250,537	50	3	3	3
Richmond, Va.[8]	245,674	51	3	3	3
Nashville, Tenn.	241,769	52	2	3	2
Salt Lake City, Utah	204,488	58	3	3	3
Jacksonville, Fla.	195,619	63	1	3	3
Chattanooga, Tenn.	193,215	64	2	3	2
Tulsa, Okla.	188,562	66	2	3	3
Des Moines, Ia.[9]	183,973	68	3	3	3
Duluth-Superior, Minn.-Wis.	157,098	75	3	3	2
Knoxville, Tenn.	151,829	78	3	3	2
Beaumont-Port Arthur, Tex.	138,608	85	3	3	1
Wichita, Kans.	127,308	92	3	3	2

Little Rock, Ark.	126,724	93	3	3	2
Phoenix, Ariz.	121,828	94	3	3	2
Shreveport, La.	112,225	101	3[17]	3[17]	2[17]
Springfield, Mo.	70,514	135	3	3	1
Two Full-time Commercial Stations					
Columbus, O.[18]	365,796	35	2	2	2
Toledo, O.[18]	341,663	37	2	2	2
Lowell-Lawrence-Haverhill, Mass.	334,969	38	2	2	1
Allentown-Bethlehem-Easton, Pa.	325,142	40	1	2	1
Norfolk-Portsmouth-Newport News, Va.	323,326	41	2	2	1
Fall River-New Bedford, Mass.	272,648	46	2	2	0
Dayton, O.[18]	271,513	47	2	2	2
Bridgeport, Conn.[18]	216,621	54	1	2	1
Grand Rapids, Mich.	209,873	55	2	2	1
Wheeling, W. Va.	196,340	62	1	2	2
Wilmington, Del.[18]	188,974	65	2	2	1
Davenport-Rock Island-Moline, Ia.-Ill.[18]	174,995	70	2	2	1
Harrisburg, Pa.[18]	173,367	71	2	2	2
Huntington-Ashland, W. Va.-Ky.	170,979	72	1	2	0
Sacramento, Cal.	158,999	74	1	2	2

APPENDIX F—Continued

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941—Continued

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
Two Full-time Commercial Stations (Continued)					
Waterbury, Conn.	144,822	82	1	2	1
Evansville, Ind.	141,614	83	2	2	2
Charleston, W. Va.	136,332	86	1	2	2
Fort Wayne, Ind.[12]	134,365	88	1	2	2
Erie, Pa.	134,039	89	2	2	2
Savannah, Ga.	117,970	95	2	2	2
El Paso, Tex.	115,801	96	2	2	2
Mobile, Ala.	114,906	97	2	2	1
Charlotte, N. C.	112,986	99	2[13]	2[13]	2[13]
Roanoke, Va.	110,598	102	2	2	1
Winston-Salem, N. C.	109,833	104	2	2	1
Portland, Me.[14]	106,568	105	2	2	2
Atlantic City, N. J.	100,098	108	2	2	1
Charleston, S. C.	98,711	109	2	2	2
Fresno, Cal.	97,504	110	2	2	2
Montgomery, Ala.	93,697	111	2	2	2
Columbia, S. C.	89,555	114	2	2	2
Springfield, Ill.	89,484	115	2	2	1
Lincoln, Nebr.[15]	88,191	116	2	2	1
Jackson, Miss.	88,003	117	2	2	2
Augusta, Ga.	87,809	118	2	2	2

[fol. 337]

Sioux City, Ia.	87,791	119	2	2	1
Manchester, N. H.	81,932	122	2	2	2
Asheville, N. C.	76,324	128	2	2	2
Macon, Ga.	74,830	129	2	2	1
Corpus Christi, Tex.	70,677	134	2	2	1
Amarillo, Tex.	53,463	140	2	2	1
Raleigh, N. C.[a]	46,897	162	2[a]	2[a]	1[a]
Dubuque, Ia.[a]	43,892	173	2	2	1
Tucson, Ariz.[a]	36,818	223	2	2	1
Orlando, Fla.[a]	36,736	225	2	2	2
Albuquerque, N. M.[a]	35,449	232	2[a]	2[a]	2[a]
Santa Barbara, Cal.[a]	34,958	236	2	2	1
Greenville, S. C.[a]	34,734	237	2	2	1
Bangor, Me.[a]	29,822	269	2	2	1
Bakersfield, Cal.[a]	29,252	268	2	2	1
Hot Springs, Ark.[a]	21,370	383	2	2	1
Albany, Ga.[a]	19,055	452	2	2	1
One Full-time Commercial Station					
New Haven, Conn.	308,228	43	0	1	0
Canton, O.	200,352	59	1	1	0
Trenton, N. J.	200,128	60	1	1	0

APPENDIX F—Continued

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941—Continued

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
One Full-time Commercial Station (Continued)					
Utica-Rome, N. Y.	197,128	61	1	1	1
Flint, Mich.	188,554	67	1	1	1
Reading, Pa.	175,355	69	1	1	1
Peoria, Ill.	162,566	73	1	1	1
Saginaw-Bay City, Mich.	153,388	77	1	1	1
Johnstown, Pa.	151,781	79	1	1	1
South Bend, Ind.	147,022	80	1	1	1
Binghamton, N. Y.	145,156	81	1	1	1
Racine-Kenosha, Wis.	135,075	87	1	1	0
Lancaster, Pa.	132,037	90	1	1	1
San Jose, Cal.	129,367	91	1	1	0
Altoona, Pa.	114,094	98	1	1	1
Lansing, Mich.	110,356	103	1	1	1
Austin, Tex.	106,193	106	1	1	0
Rockford, Ill.	105,259	107	1	1	0
York, Pa.	92,627	112	1	1	1
Columbus, Ga.	92,478	113	1	1	1
St. Joseph, Mo.	86,991	120	1	1	0
Berkeley, Cal.	85,547	*	1	1	0
Terre Haute, Ind.	83,370	121	1	1	0
Stockton, Cal.	79,337	123	1	1	0
Madison, Wis.	78,349	124	1	1	1

[fol. 339]

Topeka, Kans.	77,749	125	1	1	1
Springfield, O.[a]	77,406	126	1	1	1
Kalamazoo, Mich.	77,213	127	1	1	1
Cedar Rapids, Ia.[a]	73,219	130	1	1	1
Greensboro, N. C.	73,055	131	1	1	0
Galveston, Tex.	71,677	132	1	1	0
Waco, Tex.	71,114	133	1	1	1
Durham, N. C.	69,683	136	1	1	0
Decatur, Ill.	65,764	138	1	1	1
Pueblo, Colo.	62,039	139	1		
	No Full-time Commercial Stations				
Hamilton-Middletown, O.	112,686	100	0	0	0
Waterloo, Ia.	67,050	137	0	0	0

[fol. 340]

Summary of Cities Having Population of 50,000 or More in Which National and Columbia Restrictive Contracts with Affiliates Permit No Access, or Only a Limited Access, by Mutual
(November 1, 1941)

I

Cities in order of size having a population of 50,000 or more in which Mutual has no outlet, in which Columbia or National, or both have restrictive contracts with full-time outlets, and in which no independent full-time outlet is available.

Youngstown, O.
Toledo, O.
Dayton, O.
Miami, Fla.
Utica-Rome, N. Y.
Wheeling, W. Va.
Flint, Mich.
Reading, Pa.
Peoria, Ill.
Sacramento, Calif.
Saginaw-Bay City, Mich.
Johnstown, Pa.
South Bend, Ind.
Charleston, W. Va.
Fort Wayne, Ind.
Erie, Pa.
Savannah, Ga.
El Paso, Tex.
Altoona, Pa.
Lansing, Mich.
Portland, Me.
Charleston, S. C.
Montgomery, Ala.
Columbus, Ga.
Jackson, Miss.
Augusta, Ga.
Terre Haute, Ind.
Madison, Wis.
Springfield, O.
Kalamazoo, Mich.
Greensboro, N. C.
Durham, N. C.
Pueblo, Colo.
Topeka, Kan.[34]
Asheville, N. C.

II

Cities in order of size having a population of 50,000 or more in which Mutual has a local or part-time station as an outlet, in which Columbia or National, or both, have restrictive contracts with full-time regional or clear channel outlets, and in which no full-time regional or clear-channel facilities are available.

New Orleans, La.
Scranton-Wilkes-Barre, Pa.[35]
Hartford-New Britain, Conn.
Atlanta, Ga.
Louisville, Ky.
Albany-Schenectady-Troy, N. Y.
Rochester, N. Y.
Columbus, O.
Akron, O.
Lowell-Lawrence, Mass.
Allentown, Pa.
Norfolk, Va.
San Antonio, Tex.
Oklahoma City, Okla.
Chattanooga, Tenn.
Wilmington, Del.
Duluth-Superior, Minn.-Wis.
Knoxville, Tenn.
Little Rock, Ark.
Mobile, Ala.
Roanoke, Va.
Winston-Salem, N. C.
Sioux City, Iowa
Lincoln, Neb.
Macon, Ga.
Amarillo, Tex.

Cities in order of size having a population of 50,000 or more in which Mutual has as an outlet a station also used by another major network, in which Columbia or National, or both, have restrictive contracts with or own full-time regional or clear-channel outlets, and in which:

(a) There is no full-time independent station available.

Cleveland, O.
Houston, Tex.
Birmingham, Ala.
Richmond, Va.
Salt Lake City, Utah
Jacksonville, Fla.
Tulsa, Okla.
Des Moines, Ia.
Harrisburg, Pa.
Binghamton, N. Y.
Evansville, Ind.
Lancaster, Pa.
Charlotte, N. C.
York, Pa.
Columbia, S. C.
Manchester, N. H.
Cedar Rapids, Ia.

(b) The only independent full-time outlet available is a local station;

Memphis, Tenn.
Omaha, Nebr.
Bridgeport, Conn.
Spokane, Wash.
Corpus Christi, Tex.

Footnotes

[1] Although the determination of the number of full-time stations having adequate coverage throughout the various metropolitan areas presents several problems (due principally to doubts as to whether the low power local stations have adequate coverage), liberality has been exercised, and where doubt exists, the doubt has been resolved, in most instances, in favor of adequate coverage. In the preparation of this appendix, outstanding construction permits have been considered as authorizing operation in accordance therewith.

[2] Basic on both NBC Red and Blue, and CBS.

[3] Columbia owns KNX. KMPC is available as an alternate or additional station with KNX.

[4] These figures do not include CKLW, Windsor, Canada, Mutual's Detroit outlet. This station, which prior to 1935 was a Columbia affiliate, is used by Mutual because of the insufficient number of full-time stations having adequate coverage of the Detroit Metropolitan District.

3-42

Footnotes—Continued

[6] These figures include WREN, the NBC basic Blue network outlet. With the exception of one-half hour on weekdays from 2:30 to 3:00 p.m., WREN operates unlimited time.

[6] The coverage of all Pittsburgh stations, with the exception of KDKA, is doubtful because of the size of the Pittsburgh Metropolitan District.

[7] Basic on both NBC Red and Blue.

[8] Two stations are affiliated with Columbia, WGR and WKBW.

[9] Although the stations in this district adequately cover the cities in which they are located, it is doubtful whether their coverage is adequate for the entire metropolitan district. The only full-time station not affiliated under restrictive contracts with National or Columbia is WPCI in Pawtucket, R. I., a city adjacent to Providence.

[10] The Columbia station is WGBI, a station sharing time with WQAN.

[11] Basic on NBC Red and CBS.

[12] Basic on CBS.

[13] Basic on NBC Blue.

[14] These figures include KRLD and KGKO.

[15] Basic on NBC Blue and CBS.

[16] Basic on NBC Red.

[17] These figures include KWKH, 50 kw.

[18] This includes WBT, 50 kw.

[19] KRIS, a regional station, is affiliated with the Red and Blue networks of National. The same station is also used by Mutual. KEYS, a local station, has only recently been authorized to operate.

[20] This station is WPTF, 50 kw.

[21] This includes KOB, 50 kw.

[22] These cities are not large enough to be classified as metropolitan districts, and are included because of the presence of more than one full-time commercial station.

[23] Berkeley is not listed as a metropolitan area; it would rank 121st in population.

[24] Columbia affiliate, operates part-time.

[25] WGBI, the Columbia affiliate, shares time with WQAN but uses most of the available time.

[fol. 343] APPENDIX G

First Cancellation of the Ballantine Program

J. Walter Thompson Company
420 Lexington Avenue,
New York,
October 23, 1941.

Mr. Sidney P. Allen, Mutual Broadcasting System, 1440 Broadway, New York City.

DEAR MR. ALLEN:

We regret that it is necessary to send you the attached cancellation of the Ballantine program. However, as discussed over the telephone we plan to move the program from the Mutual Network after the broadcast of Friday, October 31.

Whenever you are able to discuss shortrate and payment details, please let me know.

Sincerely yours, J. Walter Thompson Company, (S.) Linnea Nelson.

L. Nelson: AW.

J. Walter Thompson Company
420 Lexington Avenue,
New York.

October 23, 1941.

Radio Suspension Order

Mutual Broadcasting System, 1440 Broadway, New York City.

GENTLEMEN: RE: P. BALLANTINE & SONS:

Kindly cancel broadcasting ordered for the above client as follows:

One-half hour—9:30 to 10:00 P. M. New York Time.
44 times—once a week—every Friday.
November 7, 1941 to and including September 4, 1942.

Over Mutual coast-to-coast Network—77 stations.
There is to be no broadcasting after October 31, 1941.

[fol. 344] This was ordered on June 24, July 29, August 21 and September 12, 1941.

Kindly sign and return the enclosed copy.

J. Walter Thompson Company, Per (S.) Linnea Nelson.

APPENDIX H

Final Cancellation of the Ballantine Program

J. Walter Thompson Company
420 Lexington Avenue,
New York,
October 27, 1941.

Mr. Sidney P. Allen, Mutual Broadcasting System, 1440 Broadway, New York City.

DEAR MR. ALLEN:

Attached is radio suspension order dated October 27th, which cancels and supersedes the one previously given you dated October 23rd.

Won't you please return the October 23rd copy unsigned and the October 27th copy with signature.

Sincerely yours, J. Walter Thompson Company, (S.) Linnea Nelson.

L. Nelson: AW. cc: Mr. Wood.

J. Walter Thompson Company
420 Lexington Avenue,
New York.

Radio Suspension Order

October 27, 1941.

Mutual Broadcasting System, 1440 Broadway, New York City.

GENTLEMEN: RE: P. BALLANTINE & SONS:

Kindly cancel broadcasting ordered for the above client as follows:

One-half hours—9:30 to 10:00 P. M. New York Time.

[fol. 345] 39 times—once a week—every Friday.
December 12, 1941 to and including September 4, 1942.
Over Mutual coast-to-coast Network—77 stations.
There is to be no broadcasting after December 5, 1941.

This was ordered on June 24, July 29, August 21 and September 12, 1941.

Kindly sign and return the enclosed copy.

J. Walter Thompson Company, Per (S.) Linnea Nelson.

Appendix I

Excerpts from Trade Journals on Loss of Ballantine Program

Broadcasting.
October 27, 1941.
Page 50.

Ballantine Quits Mutual for Blue

P. Ballantine & Sons, Newark brewer, is shifting its *Three Ring Time* series from MBS to NBC-Blue, beginning on the latter network Nov. 7. Series, Starring Charles Laughton, Milton Berle and Bob Crosby's orchestra, will be broadcast for 52 weeks on more than 20 Blue stations, Fridays, 8:30-9 p. m., a half-hour earlier than its present Friday evening spot on MBS.

Agency in charge of the account, J. Walter Thompson Co., New York, had nothing to say about plans for a substitute program on MBS for the duration of the contract with that network, which runs until mid-December.

In accepting the Ballantine program, NBC-Blue is deviating from the NBC code of policies and standards, which states that "alcoholic beverages may not be advertised on any network program," although individual NBC M & O stations have accepted beer advertising for local broadcasts. When this prohibition was adopted early in 1939, NBC explained that network programs must be acceptable to all parts of the country and at all times, whereas beer advertising was acceptable in some communities but not in others and was much more acceptable at some times than at others.

[fol. 346] Variety.
October 29, 1941.
Page 31.

Mutual-NBC Beer Brawl

Bitter Charges on NBC's Ways

One of Radio's Name-Calling Competitive Situations Develops as Blue Wins Account—Ballantine Will Finish 13-Week Cycle, However

"Fly" in the Suds

Radio was faced last week with one of its bitterest competitive squabbles when the J. Walter Thompson agency disclosed that the Ballantine program was switching suddenly from the Mutual Network to the NBC Blue. The furor subsided Monday (26) as NBC took the position that it would prefer to have Ballantine complete its present 13-week cycle on Mutual and that it did not want to be a party to an account's abrupt walkout from a competitive network under the circumstances that prevail.

The sudden dissipation of the proposed immediate transfer was preceded by a vigorous bombardment of charges from Mutual, with the Blue network the principal target. That the event possessed nasty litigation and publicity possibilities was immediately apparent to all when Mutual accused NBC of going to the extreme of reversing its own policy against beer advertising to wean away the account, of giving guarantees to the agency and the account against any action for damages, and of taking the program from stations presently receiving it through Mutual only to feed it back a half-hour earlier the same night at 40% less compensation to the station. The guarantee angles were stoutly denied by both NBC and the Thompson agency.

MBS' Fear

Charges of "dirty pool" were especially stressed by Mutual because of its fear that the blow will be used by rival radio salesmen and echoed by the thoughtless, including radio and other columnists, as a disparagement of Mutual. The Ballantine program with Charles Laughton, Milton Berle, Shirley Ross and Bob Crosby, was not only an important account financially but brought Mutual a name-

[fol. 347] studded cast, something extremely vital to its expansion and prestige.

The Ballantine blow was followed by rumors that NBC would go even further in competitive appeals to Coca Cola, the second big name-studded series which Mutual lined up for this season. This program has not yet begun broadcasting. Both NBC and CBS tried desperately to land the Coca-Cola contract but failed, because in some measure ASCAP music was unavailable on NBC and CBS and was available on Mutual. Personal acrimonies growing out of earlier phases of the ASCAP situation also played a part.

Sudden switch of the Ballantine Beer program may also become embroiled as an issue in the current controversy over the Federal Communications Commission's new regulations on network broadcasting. The Mutual management and legal staff have held several huddles on the matter but no decision has been made as to what trend the web's loss of the Ballantine business will take.

J. Walter Thompson, agency on the Ballantine account, had announced that the show will move into the Blue's Friday 8:30 to 9 p. m. spot Nov. 7. It would have made the first time a program had been transferred from one network to another (competitive) within the initial 13-week cycle. Acceptance of the Ballantine account involves a drastic reversal in policy on the part of NBC. Latter network had been offered the business before the program went on Mutual five weeks ago but NBC at the time refused to budge from the policy tabooing beer which has been in effect since 1936. Other recent revisions of NBC policies, but all of which have been confined to the Blue link concern the acceptance of laxative accounts and the use of recordings over a hookup.

Says Thompson

In defending its position the Thompson agency pointed out last week that the move was in line with an understanding it had with NBC at the time the agency failed to obtain facilities on the Blue for Ballantine. According to the agency, NBC was informed that if it ever changed its policy on beer to let Thompson know immediately.

Thompson got the word from NBC last Tuesday (21) and, according to the Mutual version, was given 48 hours in which to turn in an order for the Friday evening period. [fol. 348] The agency asked Mutual for a release from its

contract, which covered 52 weeks but bound the account only for 13 weeks, but Mutual not only turned down the request but advised Thompson that the account would be held liable for the billings entailed in the remaining five weeks of the 13-week cycle. This obligation amounts to $45,800. Ballantine's appropriation for time over the 52 weeks is $200,000.

When Thompson, according to Mutual, asked for the release it gave as its reason for switching networks the fact that the Ballantine program had been dropped by the Blue's affiliates in Providence, Cleveland, Bridgeport and Jacksonville. Mutual took the matter up with Ballantine Friday (24) and the account stated that it would go along with the agency on the proposition. The last ratings on the Ballantine show have been 2.9 on the Co-operative Analysis of Broadcasting and 4.8 on the C. E. Hooper reports.

Variety.
October 29, 1941.
Page 38.

The Radio Trade is Discussing: Mutual's loss of its one big Coast show to NBC, the Ballantine aler, and the expectation that other beer accounts may go NBC.

Appendix J

Excerpt from Trade Journal on March of Time Program

Broadcasting.
October 13, 1941.
Page 66.

NBC Relaxes Rule for Time Series

To cooperate with Time Inc. and Young & Rubicam in making the March of Time, which returned to the air last week as a half-hour Thursday evening Blue Network program, as effective as possible, NBC has relaxed its rules against dramatizations of war scenes and impersonations of world figures.

Series will also on occasion utilize recordings of speeches and of songs and music necessary for authentic radio presentation of current events, although recordings are usually forbidden from the networks except as sound effects.

[fol. 349] Everything possible to make these new *March of Time* broadcasts realistic and impressive will be done, according to NBC, where it was explained that when the sponsor is a publishing company with full realization of its responsibility to the public it is entitled to special consideration in instances where application of the customary network rules would adversely affect the program. Each such case will be considered as it arises on its own merits, it was stated, with decisions being made as necessary from week to week.

Appendix K

Excerpts from Trade Journals on Coca-Cola Program

Variety.
October 8, 1941.
Page 24.

Blue Expects Every Affiliate to Do Its Duty to Sterling Products

NBC station relations department disclosed last week that it proposes to have a showdown with those Blue network affiliates that pass up the two Sterling Products half-hours for the Coca Cola series which will clear through Mutual. These stations have already been given their 28-day removal notices together with a warning that NBC expects them to live up to the terms of their contract.

The Blue stations involved have guaranteed to deliver 10 p. m. across the board to Mutual for the beverage account, which starts Nov. 3. After Mutual obtained the guarantees the Blue sold the 10 to 10:30 segments, Monday and Wednesday, to Sterling with Oct. 20 the starting date.

Broadcasting.
October 13, 1941.
Page 14.

Coca Cola Series Conflicts on Blue

NBC to Hold Stations for Sterling Products Pair

Stations which are affiliated both with NBC-Blue and MBS and which have been sold as outlets for both the Coca-[fol. 350] Cola broadcasts on Mutual and the Sterling Prod-

ucts broadcasts on the Blue have received notice from NBC they will be expected to carry the Sterling Products programs.

In sending the 28-day removal notices to the six stations involved, NBC pointed out that the two Blue programs, *Monday Merry-Go-Round* for Dr. Lyons' toothpowder and *Melody Hour* for Bayer's aspirin, occur at 10-10:30 p. m. on Monday and Wednesday evenings respectively, which is network time, and that the stations are obliged to carry them under the terms of their affiliation contracts with NBC.

Other Disputes Solved

These programs start on Oct. 20 and 22. The Mutual Coca Cola series, to begin Nov. 3, calls for 10:15-10:30 p. m. broadcasts Monday through Friday, and 10-10:30 p. m. on Saturday. Blackett-Sample-Hummert, New York, is the agency for the programs on the Blue; D'Arcy Adv. Co., St. Louis, handles the Coca Cola advertising.

Signing of the Wednesday evening 10-10:30 program relieves NBC of the necessity of settling a dispute between R. J. Reynolds Tobacco Co. and American Tobacco Co.

Sale of the Wednesday evening spot to Sterling got NBC out of the middle of a dispute between two tobacco companies over seven Blue outlets in the West. When R. J. Reynolds Tobacco Co. moved its *Penthouse Party* to the Blue on Wednesdays, 9:30-10 p. m., it requested that these stations be removed from the schedule of the Kay Kyser show, broadcast 10-11 p. m. Wednesdays, sponsored by American Tobacco Co. for Lucky Strikes, under the NBC rule prohibiting continuous broadcast of competitive products. Latter program is a Red Network show, but used the Blue stations in the Western cities as supplementary outlets. When Sterling bought the Blue network 10-10:30 and preempted these stations, the contiguity was removed, automatically ending the dispute.

[fol. 350a] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HOPE H. BARROLL, JR., EXECUTIVE VICE PRESIDENT OF BALTIMORE RADIO SHOW, INC., LICENSEE OF STATION *WFBR*, BALTIMORE, MARYLAND, IN OPPOSITION TO MOTIONS FOR PRELIMINARY INJUNCTION

CITY OF WASHINGTON,
District of Columbia, ss:

Hope H. Barroll, Jr., being duly sworn, upon oath deposes and says:

1. *Deponent.* I am General Manager of Station WFBR, Baltimore, Maryland, and am Executive Vice President of the Baltimore Radio Show, Inc., the company owning and [fol. 350b] operating Station WFBR. I have been connected with Station WFBR in an executive capacity since 1933 and have intimate knowledge of the operation of a station affiliated with national network companies. I am familiar with the bills of complaint and motions for a preliminary injunction filed by plaintiffs in Civil Actions 16-178 and 16-179, together with the affidavits of plaintiffs' officers in support thereof. This affidavit is filed in opposition to plaintiffs' motions for a preliminary injunction.

As the active head of a network station operating in a large metropolitan area I have knowledge of the problems connected with the network broadcasting industry, and particularly with the operations and business practices of the National Broadcasting Company, Inc. and the Mutual Broadcasting System, Inc. I am also familiar with the regulations promulgated by the Federal Communications Commission in "In the Matter of the Investigation of Chain Broadcasting" (Docket 5060) and testified before the Senate Interstate Commerce Committee on June 20, 1941 in opposition to the adoption of the so-called White Resolution (S. Res. 113, 77th Cong., 1st Sess.) directing a study of the rules and regulations of the Federal Communications Commission pertaining to network broadcasting.

2. *Network Affiliation of Station WFBR.* From 1931 to October 1, 1941 Station WFBR was affiliated with the National Broadcasting Company, Inc. and was a basic station

on the Red network operated by that company. On the latter date the station's affiliation with National Broadcasting Company, Inc. was terminated and it became an affiliate, with an option to purchase stock, of the Mutual Broadcasting System, Inc. under circumstances explained below.

3. *Permanent Assets of Station WFBR.* The permanent assets of Station WFBR have a present or depreciated value of $177,488.83. The original cost of these assets was $256,214.83.

[fol. 350c] 4. *The option Time Clauses in Contracts between National Broadcasting Company, Inc. and Affiliates.* One of the effects of the network option time clauses in contracts between National Broadcasting Company, Inc. and its affiliates is to prevent stations from broadcasting programs of outstanding local interest during the desirable hours producing maximum listener response. Prior to October 1, 1941, the National Broadcasting Company, Inc. pursuant to contract, had an option, exercisable upon 28 days' notice, upon most of the desirable broadcasting periods of Station WFBR. This option covered the following periods:

Week Days	Sundays
10 a.m to 12 noon	1 p.m. to 4 p.m.
3 p.m. to 6 p.m.	5 p.m. to 6 p.m.
7 p.m. to 7:30 p.m.	7 p.m. to 11 p.m.
8 p.m. to 11 p.m.	

Upon 28 days' notice to the effect that National Broadcasting Company, Inc. was scheduling a network commercial program during the option periods, the licensee of Station WFBR was required to clear time for the network commercial program and discontinue local or national spot commerecial programs and even local sustaining programs of outstanding importance.

An illustration of the inability of an affiliate of National Broadcasting Company, Inc. to exercise full control over its program service and of the adverse effect upon the public interest resulting from the exercise of options on stations' time by the National Broadcasting Company, Inc., is shown by the request of National Broadcasting Company, Inc. that Station WFBR broadcast the Proctor & Gamble

program. In January, 1940 Baltimore Radio Show, Inc. received a request from the National Broadcasting Company, Inc. to broadcast a commercial program for Proctor & Gamble from 9:30 to 10:00 p.m. each Friday. For two or three years prior thereto, Station WFBR had been broadcasting a recruiting program for the Maryland National [fol. 350d] Guard at the special request of Major General Milton A. Reckord, Commanding General of the 29th Division stationed at Ft. Meade. This program was broadcast every Friday from 9:45 to 10:00 p.m. Baltimore Radio Show, Inc. advised the National Broadcasting Company, Inc. that as it considered the National Guard program to be more in the public interest than the Proctor & Gamble program and as the schedules for the programs conflicted, the station would be unable to broadcast the Proctor & Gamble commercial program. I received a letter in reply from Mr. William S. Hedges, vice president of the National Broadcasting Company, Inc., stating that our scheduling of the National Guard program was "grossly unfair" in that the licensee had scheduled it in network option time, complaining of the lack of cooperation rendered by the licensee to the network, and threatening to shift Station WFBR from the profitable Red Network with which it had been affiliated since 1931 to the Blue network. This letter from Mr. Hedges reads as follows:

"January 25, 1940.

Mr. Hope H. Barroll, Jr., General Manager, Radio Station WFBR, Baltimore, Maryland

DEAR HOPE:

Commercial Traffic has given me a copy of your wire in which you refuse to accept P&G Friday 9:30-10:00. If the Maryland National Guard program is of such transcendent importance, why don't you use your own time for it? That was the reason why time of affiliates was divided between network optional time and station time. We have always been willing to step aside for important local broadcasts which come up from time to time, but I think it is grossly unfair for you to set up a permanent schedule in network optional time for something which you should handle in your own station time.

[fol. 350e] I must say that I have not been at all happy with the degree of cooperation which you have extended to

NBC during the recent months. It can lead to only one conclusion, and that is that you are not happy as a member of the Red network. Maybe we can do something about that, too.

Sincerely yours, (s) Bill. William S. Hedges."

On February 15, 1940, I replied to Mr. Hedges' letter and attach hereto as Exhibit "A" a copy of my reply.

The position taken by the National Broadcasting Company, Inc. resulted in the licensee of Station WFBR moving the National Guard program to a less desirable period. This shift meant a loss of a great part of the audience which had become accustomed to listening to this program from 9:45 to 10:00 p. m. The Procter & Gamble program is the same program which previously had been scheduled for the period from 7:00 to 7:30 p. m. on Saturdays. The Baltimore Radio Show, Inc. had not been able to clear this time due to the fact that another sustaining program concerning the City Health Department had used that spot for several years. The offer of the licensee of Station WFBR to record the Procter & Gamble program and brodacast it at another time proved unsatisfactory to the sponsor and the order was cancelled. The program was then placed on Station WBAL in Baltimore and was broadcast by that station until the decision of the sponsor to shift the program from Saturday to Friday.

If Regulation 3.105 had been in effect when the Procter & Gamble program was offered to Station WFBR, the licensee would have been able to reject the Proctor & Gamble program and to continue to broadcast the National Guard program during its regular period. This regulation, in effect, provides that no contract between a network and its affiliates shall contain a provision preventing the affiliate from substituting a program of outstanding local import-

[fol. 350f] ance for a network commercial program. Moreover, Regulation 3.104 limits the amount of option time that a national network company may have on an affiliate station, so that, in any event, a reasonable amount of time in each part of the day will remain free from network options and from any obligation thereunder.

5. *Loss of Red Network Affiliation by Station WFBR.* By reason of the operation of two networks by National Broadcasting Company, Inc., that company is in a position to exert pressure, and does exert pressure, upon affiliates to

comply with its demands under threat of being shifted from one of its networks to the other. In 1940 I learned that National Broadcasting Company, Inc. contemplated shifting Station WBAL, the regular Blue network outlet in Baltimore, to the Red network and Station WFBR to the Blue network. Shortly thereafter I had a conference with Mr. Trammell, president of National Broadcasting Company, Inc., in New York, at which conference were also present Mr. Phillip G. Loucks, one of my attorneys, and Mr. Harold Batchelder, my associate. Mr. Trammell notified us at this conference that National Broadcasting Company, Inc. had concluded arrangements to shift Station WBAL in Baltimore to the Red network as of October 1, 1941, thus requiring Station WFBR to move to the Blue network. Mr. Trammell offered to permit Station WFBR to become a basic Blue network outlet with a network rate of $300.00 per hour, which was the network rate that the licensee of Station WFBR had requested National Broadcasting Company, Inc. to charge for the station for some time. The local rate of Station WFBR had been $300.00 per hour for several years while the network rate had been $260.00. Further, National Broadcasting Company, Inc., through its president, Mr. Trammell, offered to guarantee that the compensation from National Broadcasting Company, Inc. to the Baltimore Radio Show, Inc. would be $125,000 for the first year, $100,000 for the second year and the third year [fol. 350g] guarantee would be negotiated. This offer of guaranty in connection with the Blue network, whereas there had never been any guaranty or offer of one in connection with the Red network, was confirmed in writing by Mr. Trammell. Upon information and belief, this guaranty was made for the purpose of preventing the affiliation of Station WFBR with the Mutual Broadcasting System, Inc.

6. *Irreparable Injury to Station WFBR.* The granting of plaintiffs' motions for a preliminary injunction would cause irreparable injury to the licensee of Station WFBR. Due to the limitation in the number of full time broadcast stations rendering adequate coverage, Mutual Broadcasting System, Inc. finds it necessary in 27 cities, many of which are important markets, to transmit its network programs to a station also used by one of the other national network companies. These stations have granted options on all or most of their desirable hours to National Broadcasting Company, Inc. or to Columbia Broadcasting Sys-

tem, Inc. The exercise of such options by competitive networks during periods when commercial programs of Mutual Broadcasting System, Inc., are being broadcast results either in the enforced transcribing of the Mutual programs and their broadcast at a later time or on another day or, if the advertisers are not satisfied with the presentation of their programs through recordings, the advertisers discontinue the use of the Mutual network. Similarly, many advertisers are unwilling to consider the use of the Mutual network either because of its inability to reach many important markets or its inability to assure the continued availability of the time of its affiliated stations to advertisers during the periods of time covered by their respective contracts.

The Ballantine Ale program, referred to in Mr. Weber's affidavit, is an outstanding commercial program and has been broadcast by Station WFBR since its affiliation with [fol. 350h] the Mutual network. However, due to the exercise by National Broadcasting Company, Inc. of its options on broadcasting time of its affiliates carrying this program, which options were exercised in order to schedule a commercial program for Canada Dry Ginger Ale, a competitive beverage, the J. Walter Thompson Company, advertising agent for the Ballantine Ale program, gave notice of cancellation of the program, effective December 5, 1941. The licensee's time charges on Station WFBR for broadcasting the Ballantine Ale program during the remainder of the period covered by the contract would have amounted to $4,095.00 and the net return to the Baltimore Radio Show, Inc., if the program had not been cancelled, would have been $2,869.89.

At the present time Station WFBR broadcasts 17½ hours of Mutual commercial programs a week, and 11½ hours of the total are carried during the periods that National Broadcasting Company, Inc. has the right to exercise options on the broadcasting time of its affiliates. The contracts calling for the broadcasting of Mutual commercial programs on Station WFBR are cancellable at the end of any 13-week cycle upon four weeks' notice. As of November 1, 1941, the licensee's time charges on Station WFBR for Mutual commercial programs presently arranged for amount to $96,787.86, and the licensee's time charges for such programs broadcast during the periods that National Broadcasting Company, Inc. has contracted for network

option time of affiliates total $67,854.36. The net return to Baltimore Radio Show, Inc. on the former sum would be $67,831.38 and on the latter sum $47,554.05. A stay of the Commission's regulations will not only cause irreparable injury to the licensee of Station WFBR so far as future network business is concerned, but also will seriously jeopardize the receipt by Baltimore Radio Show, Inc. of the above-stated sum of $47,554.05 on existing network business.

It is my information and belief that the situation with respect to irreparable injury to the licensee of Station [fol. 350i] WFBR resulting from a stay of the Commission's regulations applies equally to other affiliates of Mutual Broadcasting System, Inc., although, due to differences in rates charged advertisers by such other licensees and the number of network commercial programs broadcast, the extent of the irreparable injury in some instances will be less, and in other instances, greater than that which will be sustained by the licensee of Station WFBR.

Hope H. Barroll, Jr.

Subscribed and sworn to before me this 11th day of December, 1941. Miriam Koontz, Notary Public. My commission expires February 14, 1946. (Seal.)

[fol. 350j] EXHIBIT "A"

"February 15, 1940.

Mr. William S. Hedges, Vice President,
National Broadcasting Company,
RCA Building,
New York City.

DEAR BILL:

Mr. Batchelder [Vice President and Treasurer of our station] and I have just completed arrangements to move into our time the program of the Maryland National Guard, in order to clear the time from 9:30 to 10:00 P. M. on Fridays to carry the Procter & Gamble "What's My Name" program during this period. The Maryland National Guard program is an important local sustaining program devoted to recruiting activities which we have been carrying

from 9:45 to 10:00 P. M. Fridays and it has been difficult for us to arrange for the shift to other time. However, since the period involved falls within time optioned for network programs we have arranged to clear it, effective March 1, in order to comply with the terms of our agreement with you.

The Procter & Gamble program is the same program which was at one time scheduled for the period from 7:00 to 7:30 P.M., Saturdays, which time we found impossible to clear at the time due to the program of the City Health Department, another sustaining program of great local importanee and one which has been on our station for several years. You will recall that we offered to record this program and broadcast it at another time but the sponsor decided not to use this delayed broadcast and you cancelled the order. The program was then placed on WBAL which apparently proved satisfactory to all concerned until this recent decision to shift the program from Saturdays to Fridays. And, as I said before, we have arranged to clear this time on Fridays in order to make this time available.

I am reviewing and explaining this situation because of the implication contained in the last paragraph of your letter of January 25 relating to the same general subject. It is not our desire to be non-cooperative, but I hasten to point out that both the City Health and National Guard programs are old programs on our station which we regard [fol. 350k] as important public services and both are eager to keep the times assigned to them. Both were assigned to their present periods when these periods were unused by your company. Their reluctance to give up these periods must be readily understood under the circumstances. However, you have a right to the time under the contract and in recognition of that right we have arranged to shift the National Guard program thus making the time available on March 1—the date the Oxydol program is to start.

We did not carry the Pot O' Gold program which you offered for reasons which we made clear to you at the time. While we were advised by our lawyers that they might be able to defend us successfully if the program were ever questioned, we did not feel that we wanted to undertake the risk of making such a defense for a program which we considered to be of doubtful public interest. However, you will recall that even with these doubts, we expressed a willingness to carry the program on condition that your com-

pany would undertake any risks that might be involved. But no useful purpose can be served by going back over this history now, except to say that we felt then and still feel that we were within our rights in not broadcasting this particular program.

If you will examine the relationship which has existed for some years between your Company and WFBR, you will find that WFBR has been very cooperative and we ask that you take this fact into consideration before making such statements as those contained in your letter of January 25.

Yours sincerely, (S.) Hope H. Barroll, Jr., Executive Vice President."

[fol. 351] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF TELFORD TAYLOR IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

DISTRICT OF COLUMBIA, ss:

Telford Taylor, being duly sworn says:

(1) That he is the General Counsel of the Federal Communications Commission;

(2) Attached hereto are certified copies of (a) letter from National Broadcasting Company to a licensee, dated December 10, 1941; (b) page 35 from the applications of National Broadcasting Company and Radio Corporation of America for the assignment of license of Station WENR (file B4-AL-328), giving reasons for the requested assignment; (c) Order of the Commission dated December 23, 1941, approving the assignment of licenses of Stations WJZ, WENR and KGO from National Broadcasting Company to Radio Corporation of America; (d) Order of the Commission dated December 23, 1941, granting the applications of National Broadcasting Company, Inc., and M. A. Leese Radio Corporation for assignment of license of Station WMAL to M. A. Leese Radio Corporation;

(3) Affiant submits that the attached material is relevant on the issues sought to be raised by plaintiffs' Motion for Preliminary Injunction, particularly with respect to Regulations 3.101, 3.106 and 3.107.

Telford Taylor.

Subscribed to and sworn before me this third day of January, 1942. Stephen Tuhy, Jr., Notary Public. My commission expires Oct. 14, 1943. (Seal.)

National Broadcasting Company, Inc.

New York, N. Y.

December 10, 1941.

William S. Hedges, Vice President.

GENTLEMEN:

As you know, we have instituted suit against the Federal Communications Commission for the purpose of securing [fol. 352] a judicial determination of the Commission's power to regulate business practices as attempted by it in its Network Broadcasting Order of May 2, 1941. Although it is the firm position of NBC that the Order is wholly outside the Commission's jurisdiction, NBC does not believe that its position upon this point of law should prevent it from making its own decisions of business policy.

During these times of emergency all of our efforts should be devoted to the maintenance and improvement of our nationwide network broadcasting services which play such an important part in sustaining national morale. NBC has consistently maintained that radio's vital contribution to the national defense will be strengthened by setting aside all disputes not essential to the existence of the industry. This has direct application to our present situation.

The Commission and others have criticized several provisions of our network affiliation contracts. While we believe that all of these provisions are desirable for network operation in the public interest, both from the stations' standpoint and our own, we do not believe that all of them are indispensable. Last summer, you will recall, we deleted some of these provisions from our contracts.

Now we are writing to inform you that NBC has decided to eliminate as a term of network affiliation any obligation pursuant to which an NBC affiliate may not broadcast the

programs of another network at such times as do not conflict with the station's obligation to broadcast NBC programs. You may deem this letter a modification of your contract of network affiliation with us to the extent that such contract may be inconsistent with the foregoing. All other provisions of the contract, including provisions concerning network optional time, remain unchanged.

We firmly believe that the indispensable element in every network affiliation contract is a provision giving the network a firm option on a reasonable amount of time, exercisable on reasonable notice. We do not believe that the provisions of the Network Broadcasting Order permitting so-called "non-exclusive option time" on 56 days notice are workable. Our suit against the Commission seeks to preserve the all-important right to obtain a firm option of the type we regard as essential to the continuance of the pres-[fol. 353] ent high standard of nationwide network broadcasting.

Very truly yours, National Broadcasting Company, Inc., by (Signed) William S. Hedges, Vice President.

Certificate

I, T. J. Slowie, Secretary of the Federal Communications Commission, do hereby certify that the attached letter is a true and correct copy of a letter dated December 10, 1941, sent by National Broadcasting Company to a licensee, and filed by it with the Commission pursuant to Section 43.1 of the Commission's Rules and Regulations and Form 335. Similar letters to other licensees are on file with the Commission.

Federal Communications Commission, T. J. Slowie, Secretary.

Reasons for Assignment

21. (a) Give here the reasons for the proposed assignment, the specific objects sought, and benefits to be attained upon the approval of this application. Upon approval of this application the assignor will be in a position to effect a separation of the business of the station from that of the assignor and the assignee will be in a position and will be willing to comply with the view with respect to the disposition of the station expressed by the Commission in its

report on May 2nd, 1941, in Docket 5060. It is the position of RCA and NBC that the order of the Commission based on its report of May 2nd, 1941, in Docket 5060 is wholly outside the Commission's jurisdiction. RCA and NBC do not believe that their position upon this point of law should prevent them from making their own decisions of business policy. It is believed that the station is presently rendering a high type of public service and this level of service is to be maintained. It is not presently anticipated that any change in service will be made.

22. There are submitted herewith the names and addresses of all counsel (legal, engineering, or accounting), together with the name and address of firm, if any, with which connected, who have prepared, or assisted in the preparation of, the application and exhibits. (Show opposite the name of each the part of application or specific exhibit or exhibits prepared.)

[fol. 354] Authority of any Other Regulatory Agency Obtained

23. If any part of the proposal involved in this application is subject to regulation or approval by any other Federal or State body, show here the character and status of such proceeding and submit certified copies of all pleadings filed therewith, together with any orders issued by said body None required

Certificate

I, T. J. Slowie, Secretary of the Federal Communications Commission, do hereby certify that the attached page is a true and correct copy of page 35 from the applications of National Broadcasting Company and Radio Corporation of America for assignment of license of Station WENR (File B4-AL-328) giving the reasons for the requested assignment and that a similar statement is contained in the applications of National Broadcasting Company and Radio Corporation of America for the assignment of licenses of Stations KGO and WJZ (Files B5-AL-326, and B1-AL-327).

Federal Communications Commission, T. J. Slowie
Secretary.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

File Nos. B5-AL-326. B1-AL-327. B1-AL-328

In re Applications of

NATIONAL BROADCASTING COMPANY, INC., Assignor,

and

RADIO CORPORATION OF AMERICA, Assignee,

For Consent to Assignment of Licenses of Stations KGO, WJZ and WENR

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 23rd day of December, 1941;

The Commission having under consideration the above-described applications; and

[fol. 355] It Appearing that the applicants represent that the transfer of the properties and licenses of Stations KGO, WJZ and WENR, as proposed in these applications, is intended as an initial step toward the segregation of the Blue Network assets of the National Broadcasting Company; that immediate preparations will be made for the transfer of station properties and licenses of Stations KGO, WJZ and WENR to a new subsidiary of Radio Corporation of America; and that these steps are proposed for the purpose of making ultimate disposition of the Blue Network and complying with the views expressed by the Commission in its report of May 2, 1941, Docket 5060; and

It Appearing Further from examination of the applications and the matters submitted in support thereof that the public interest would be served by the granting of the same;

It Is Ordered, That the aforesaid applications Be, and They Are Hereby, Granted.

Federal Communications Commission, T. J. Slowie, Secretary.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.

File No. B1-AL-315. Docket No. 6071

In re Applications of

NATIONAL BROADCASTING CO., INC. (WMAL)

and

M. A. LEESE RADIO CORPORATION
For Assignment of License

and

NATIONAL BROADCASTING CO., INC. (WMAL)
For Renewal of License

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 23rd day of December, 1941;

The Commission having under consideration the petition of The Evening Star Newspaper Company and M. A. Leese [fol. 356] Radio Corporation to reconsider and grant the above-entitled application for assignment of license; and

It Appearing that on February 28, 1933, the Federal Radio Commission granted its consent to the assignment of license for the operation of Station WMAL from M. A. Leese Radio Corporation to the National Broadcasting Co., Inc.; that the National Broadcasting Co., Inc., has since operated said station, using equipment owned and leased to it by M. A. Leese Radio Corporation; that on May 1, 1938, the entire stock of M. A. Leese Radio Corporation was purchased by The Evening Star Newspaper Company; that since May 1, 1938, M. A. Leese Radio Corporation has expended the sum of approximately $150,000 in new construction and equipment of Station WMAL, such sum having been advanced by The Evening Star Company as the sole stockholder of M. A. Leese Radio Corporation; and that a grant of said application will eliminate the multiple control by National Broadcasting Co., Inc., of radio broadcast stations in Washington, D. C.; and

It Further Appearing upon reexamination of said assignment of license application in the light of the said petition that public interest, convenience and necessity will be served by the granting thereof; and

It Further Appearing that the Commission has hereto-

fore designated for hearing the application for renewal of license for the operation of Station WMAL, and that the assignment of said license to M. A. Leese Radio Corporation elminates the conditions which caused the Commission to designate said renewal of license application for hearing; and

It Further Appearing upon reexamination of the application for renewal of license of Station WMAL that public interest, convenience and necessity will be served by the granting thereof;

It Is Ordered that the petition for reconsideration and grant of the above-described assignment of license application Be, and It Is Hereby, Granted; and that said application Be, and It Is Hereby, Granted.

It Is Further Ordered, upon the Commission's own motion that the hearing heretofore scheduled upon the above-described renewal of license application for Station WMAL Be, and It Is Hereby, Cancelled; and that said application Be, and It Is Hereby, Granted.

Federal Communications Commission, T. J. Slowie, Secretary.

[fol. 357] [Endorsed:] United States District Court, Southern District of New York. National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg Carlson Telephone Manufacturing Company, Plaintiffs, vs. United States of America and the Federal Communications Commission, Defendants. Affidavit in Opposition to Plaintiffs' Motion for Preliminary Injunction. Samuel Brodsky, Special Assistant to the Attorney General. Telford Taylor. Thomas E. Harris.

In United States District Court for the Southern District of New York

[Title omitted]

Reply Affidavit of Niles Trammell

United States of America,
Southern District of New York,
City, County and State of New York, ss:

Niles Trammell, being duly sworn, deposes and says:

I am the President of the National Broadcasting Company, Inc. (hereinafter called "NBC"), one of the plaintiffs

in this action. This affidavit is made in reply to the affidavits of Fred Weber and Hope H. Barroll, both verified December 11, 1941 and submitted by Mutual Broadcasting System, Inc. in opposition to motions for preliminary injunction.

I

Mutual in the Advertising Market

The Mutual Broadcasting System is not always so downhearted about its competitive position as Mr. Weber's affidavit would indicate. A document entitled "A Presentation of the Mutual Broadcasting System Spring 1941" issued by Mutual Broadcasting System, states that Mutual Broadcasting System has a 150% advantage over the Blue Network and then continues:

"Mutual has a

24% advantage in
the 1st hundred markets
[fol. 358] 48% advantage in
the 2nd hundred markets
49% advantage in
the 3rd hundred markets

1st Hundred Markets

Mutual has a full-time outlet; NBC Blue has not		Here NBC Blue has a full-time outlet; Mutual has not	
Columbus	Ohio		
San Antonio	Texas		
Nashville	Tenn.		
New Haven	Conn.		
Springfield	Mass.		
Fort Worth	Texas		
Grand Rapids	Mich.		
Scranton	Pa.		
Norfolk	Va.	Milwaukee	Wis.
Wichita	Kans.	Toledo	Ohio
Wilmington	Del.	Richmond	Va.
Chattanooga	Tenn.	Miami	Fla.
Knoxville	Tenn.	Youngstown	Ohio
Fresno	Calif.	Flint	Mich.
Duluth	Minn.	Sacramento	Calif.
Canton	Ohio	Jacksonville	Fla.
Tacoma	Wash.	Fort Wayne	Ind.
Wilkes-Barre	Pa.	Lansing	Mich.
Lincoln	Neb.	Erie	Pa.
New Bedford	Mass.	Tampa	Fla.
Retail Sales		Retail Sales	
$1,099,461,000		$885,755,000	

2ND HUNDRED MARKETS

Mutual has a full-time outlet; NBC Blue has not		Here NBC Blue has a full-time outlet; Mutual has not	
Waterbury	Conn.		
Little Rock	Ark.		
Rockford	Ill.		
Fall River	Mass.		
Lowell	Mass.		
Roanoke	Va.		
Austin	Texas		
Huntington	W. Va.	Stockton	Calif.
Lexington	Ky.	Evansville	Ind.
Mobile	Ala.	Wheeling	W. Va.
Winston-Salem	N. C.	Springfield	Ill.
Elmira	New York	Manchester	N. H.
Macon	Ga.	Sioux City	Iowa
San Bernardino	Calif.	Terre Haute	Ind.
Yakima	Wash.	Columbia	S. C.
Steubenville	Ohio	Poughkeepsie	New York
Greenville	S. C.	Augusta	Ga.
Waco	Texas	Jackson	Mich.
Raleigh	N. C.	Battle Creek	Mich.
Pittsfield	Mass.	Jackson	Miss.
Retail Sales		Retail Sales	
$485,418,000		$327,112,000	

[fol. 359]

3RD HUNDRED MARKETS

Mutual has a full-time outlet; NBC Blue has not		NBC Blue has a full-time outlet; Mutual has not	
Amarillo	Tex.		
Easton	Pa.		
Fargo	N. D.		
Lynchburg	Va.		
Lewiston	Maine	Orlando	Fla.
New London	Conn.	Johnstown	New York
Santa Ana	Calif.	Reno	Nev.
Portsmouth	Ohio	Baton Rouge	La.
Hagerstown	Md.	Pueblo	Colo.
Danville	Va.	Bay City	Mich.
Bellingham	Wash.	Spartanburg	S. C.
Everett	Wash.	Enid	Okla.
Retail Sales		Retail Sales	
$185,893,000		$124,541,000	

Naturally you will want to ask this question • • • with *twice* the popularity in the leading 32 cities • • • with coverage of *more* of the leading 300 markets • • • will Mutual this fall be more expensive than its Blue competition?

The answer is • • • NO."

II

The Network Affiliation "Market"

It is time that the true situation with respect to the network affiliation "market" be made clear.

The Mutual Broadcasting System attained the status of a nationwide network organization in 1936. Since that date practically every station now affiliated with NBC has entered into its present contract with NBC and each of these stations was free to affiliate itself with Mutual or any other network organization had it so desired.

Since 1938 affiliation contracts between NBC and approximately 80 radio stations then affiliated with NBC have expired and the stations have had a choice of affiliation. From October 1,.1938 through the end of 1941, NBC entered into contracts of affiliation with aproximately 100 additional stations, which of course were free to affiliate themselves with any other network organization. Since 1938 only five former affiliates of the NBC have chosen to leave NBC for the Mutual Broadcasting System. These stations are located in

Boston
Providence
[fol. 360] Bridgeport
Baltimore
Pittsburgh

These facts speak for themselves.

III

Baltimore Radio Show, Inc. and Station WFBR

In his affidavit verified December 11, 1941, Mr. Hope H. Barroll, Executive Vice President of Baltimore Radio Show, Inc., contends tha NBC had the power under its affiliation contract with Baltimore Radio Show, Inc. to switch its Station WFBR from the Red Network to the Blue Network.

It should first be pointed out that *never* in the history of the National Broadcasting Company, has an affiliate been shifted from one of the NBC networks to another during the life of its contract against its wish. No effort was made in the case of Station WFBR to shift it from the Red Network to the Blue Network during the life of its contract which expired on September 30, 1941.

Upon the expiration of its affiliation contract, Station WFBR became affiliated with Mutual Broadcasting System. This change of affiliation from NBC to Mutual is an example of competition between network organizations for affiliated

stations. An endeavor to make more than this of the case of WFBR is to totally disregard the commercial facts surrounding that situation.

For a considerable time prior to this change in affiliation Station WFBR had been dissatisfied with its network rate to advertisers upon which its compensation for the broadcasting of network commercial programs was based. Its network rate had initially been set at $240 per hour and this was in excess of the rate warranted by its coverage when compared with other stations on the Red Network. Upon obtaining a grant of increase in power which made its network rate of $240 per hour the usual rate for a station of the coverage which such increased power brought, the station felt dissatisfied and wanted an increase of $60. This increase was not warranted by the coverage of Station WFBR when compared with other stations on the Red Network. NBC was willing to increase the network rate of Station WFBR by $20, and did so. In spite of this increase, Station WFBR became increasingly dissatisfied with its network rate.

[fol. 361] The coverage of the NBC Red Network stations in Washington and in Philadelphia was such that the duplicated coverage of Station WFBR was considerably greater on the Red Network than it would have been had WFBR been on the Blue Network. NBC was consequently able to offer Station WFBR a higher network rate on the Blue Network. This, however, also was unsatisfactory to Station WFBR.

It was after the increase of $20 an hour (when WFBR felt entitled to a $60 increase) that there were increasing numbers of instances in which the station placed difficulties in the way of the exercise by NBC of options upon the station's time. It will be recalled that the time subject to options on the majority of NBC affiliates, including Station WFBR, is only 8½ hours per day, leaving ample time in which the affiliates, including Station WFBR, can schedule programs of local importance. NBC is currently utilizing 83.1% of the 8½ hours per day subject to option on the basic Red Network for network commercial programs. The amount of option time utilized by a network organization for a nationwide network commercial program varies from network to network. For example, on the basic Blue Network the 8½ hours subject to option are utilized only about

half as much for the broadcasting of network commercial programs as on the Red. Any station choosing to affiliate itself with the Red Network must, therefore, expect heavy network commercial traffic within network option time. This is generally understood in the industry and, as it is amply remunerative to the affiliates, it is rare to find an affiliate on the Red Network endangering a program to the whole network by refusing to respect its contractual obligation.

IV

Distribution of Facilities Among Network Organizations

The affidavit of Fred Weber, submitted on behalf of the Mutual Broadcasting System, Intervenor, seeks to indicate that the Mutual System has been prevented by NBC and CBS from obtaining outlets in various radio markets. The true facts of the matter can readily be made clear.

The United States Census of 1940 defined 140 metropolitan areas. These areas represent the most important [fol. 362] population centers in the United States and range in population from the New York metropolitan area, which includes such cities as Elizabeth, Jersey City, Newark, Paterson and Yonkers in addition to the five boroughs and which has a population of 11,690,520, to the 140th in rank, Amarillo, Texas, which has a total population of 53,463. It can readily be seen that there is a wide divergence in the station power required to cover the various 140 metropolitan areas.

In general, stations of high power are probably essential only for those areas having populations in excess of 500,000. The areas of lesser population can, with very few exceptions, be adequately covered by a 250 watt station.

Neither the Red Network of NBC nor the Blue Network has stations of high power in all of these 140 metropolitan areas. In fact the Red Network has a 250 watt station which it shares with the Blue in one area having a population of 629,581 while the Blue Network uses 250 watt stations in three of the areas having a population of 500,000 or greater. Mutual also uses stations of 250 watt power in three such areas. In the Scranton-Wilkes-Barre area Mutual is affiliated with one 250 watt station and one 100 watt station, while the Red and the Blue Networks share one 250 watt station located in Wilkes-Barre, Pennsylvania.

However, in so far as Mr. Weber's affidavit complains of the existing situation with respect to power, his complaint must be directed to the Federal Communications Commission, which alone has authority to change that situation. The attack of Mr. Weber upon the other network organizations must, therefore, be confined to the charge that the other network organizations have, as affiliates, an undue proportion of available outlets. The following table shows the numerical distribution of outlets in the 140 first metropolitan areas.

Metropolitan Areas	Red Network	Blue Network	CBS	Mutual
1st 25	25	26	26	29
2nd 25	16	20	19	21
3rd 25	15	17	15	17
4th 25	15	15	14	13
5th 25	12	12	12	9
Next 15	4	4	6	5
Total	87	95	92	94

[fol. 363] In these 140 areas there are 53 in which the Red Network does not have an affiliated station. There are 47 areas in which the Blue Network does not have an affiliated station and there are 52 areas in which Mutual does not have an affiliated station. NBC has never considered and its experience shows that it is not essential to network operation to have an affiliated station in every one of these high population centers. It is quite probable that, even though stations were available in many of the population centers in which neither the Red Network nor the Blue Network has an affiliated station, NBC would not desire to enter into contractual agreements with such stations because of problems of overlapping coverage. Neither do I believe that Mutual would desire to have an affiliated station in each of the first 140 metropolitan areas.

In only one of the first 25 markets, Milwaukee, Wisconsin, does Mutual lack an outlet and the Milwaukee outlet was available to Mutual prior to its affiliation with the Blue Network. From that fact it can be presumed that Mutual did not desire to affiliate with the station because coverage of their 50,000 watt station in Chicago, WGN, was regarded as perfectly satisfactory for this market.

In his affidavit Mr. Weber enumerated the cities in which the Red Network and the Blue Network or both have contracts with stations but in which he alleges Mutual is unable

to obtain an outlet. For the purpose of comparison there are enumerated below the 24 cities in the first 140 metropolitan areas in which Mutual has an outlet but in which the Red Network does not have an outlet:

Scranton
Rochester
Springfield-Holyoke
Akron
Lowell-Lawrence
New Haven
Fall River-New Bedford
San Diego
Canton
Moline-Davenport-Rock Island
Huntington-Ashland
Tacoma
Binghamton
Waterbury
[fol. 364] Beaumont-Port Arthur
San Jose
Roanoke
Austin
Rockford
Lincoln
Sioux City
Macon
Cedar Rapids
Waco

The following list of 22 cities in the first 140 metropolitan areas are those in which Mutual has an outlet but in which the Blue Network does not have an outlet:

Scranton
Lowell-Lawrence
San Antonio
New Haven
Fall River-New Bedford
Canton
Wilmington
Huntington-Ashland
Tacoma
Binghamton
Waterbury

San Jose
Mobile
Roanoke
Winston-Salem
Austin
Rockford
Lincoln
Macon
Cedar Rapids
Waco
Amarillo

For the purpose of further comparison there are enumerated below the cities in the first 140 population centers in which the Red Network has no affiliated station, the cities in which the Blue Network has no affiliated station and the cities in which the Mutual Network has no affiliated station:

[fol. 365] Red	Blue	Mutual
Rochester	Lowell-Lawrence-Haverhill	Milwaukee
Springfield-Holyoke	San Antonio	Youngstown
Youngstown	New Haven	Toledo
Akron	Worcester	Worcester
Lowell-Lawrence-Haverhill	Fall River-New Bedford	Dayton
New Haven	Canton	Miami
Fall River-New Bedford	Trenton	Salt Lake City
Dayton	Utica-Rome	Trenton
San Diego	Wilmington	Utica-Rome
Bridgeport	Reading	Wheeling
Canton	Huntington-Ashland	Flint
Trenton	Peoria	Reading
Utica-Rome	Tacoma	Peoria
Wheeling	Johnstown	Sacramento
Flint	South Bend	Saginaw-Bay City
Moline-Davenport-Rock Island	Binghamton	Johnstown
Huntington-Ashland	Waterbury	South Bend
Peoria	Racine-Kenosha	Charleston (W. Va.)
Sacramento	San Jose	Racine-Kenosha
Tacoma	Savannah	Fort Wayne
Saginaw-Bay City	Mobile	Erie
South Bend	Altoona	Phoenix
Binghamton	Hamilton-Middletown	Savannah
Waterbury	Shreveport	El Paso
Beaumont-Port Arthur	Roanoke	Altoona
Racine-Kenosha	Winston-Salem	Hamilton-Middletown
Erie	Portland	Shreveport
San Jose	Austin	Lansing
Hamilton-Middletown	Rockford	Portland
Roanoke	Atlantic City	Atlantic City
Lansing	Charleston	Charleston
Austin	Fresno	Fresno
Rockford	Columbus	Montgomery
	Lincoln	Columbus
		Springfield (Ill.)

Red	Blue	Mutual
Atlantic City	St. Joseph	Jackson
Columbus	Topeka	Augusta
Springfield (Ill.)	Kalamazoo	St. Joseph
Lincoln	Asheville	Terre Haute
Augusta	Macon	Stockton
Sioux City	Cedar Rapids	Madison
St. Joseph	Greensboro	Topeka
Stockton	Galveston	Springfield (O.)
Topeka	Waco	Kalamazoo
Springfield (O.)	Durham	Asheville
Kalamazoo	Waterloo	Greensboro
Macon	Decatur	Galveston
Cedar Rapids	Amarillo	Springfield (Mo.)
Greensboro		Durham
Galveston		Waterloo
Waco		Decatur
Durham		Pueblo
Waterloo		
Decatur		
Pueblo		

In order to complete the presentation there is shown below the list of cities in which the Red Network stations also take Mutual programs; the cities in which the Blue Network stations also take Mutual programs, and the [fol. 366] cities in which both the Red and Blue Network stations also take Mutual programs:

Red—	Charlotte
	Manchester
Blue—	Cleveland
	Providence
	Houston
	Birmingham
	Memphis
	Richmond
	Bridgeport
	Jacksonville
	Tulsa
	Des Moines
	Spokane
	Columbia
Red-Blue—	Harrisburg
	Evansville
	Lancaster
	York
	Corpus Christi

Finally there is tabulated below the 18 cities in which the Red and Blue Networks share stations:

Scranton-Wilkes-Barre
Columbus (O.)
Allentown-Bethlehem-Easton
Norfolk
Syracuse
Nashville
Grand Rapids
Chattanooga
Duluth-Superior
Knoxville
Charleston (W. Va.)
Wichita
Phoenix
El Paso
Montgomery
Terre Haute
Madison
Springfield (Mo.)

[fol. 367] Discussion of population centers which do not come within the 140 metropolitan areas of the United States as defined by the United States Census is omitted from this affidavit. It is inconceivable that the failure of a network to have an affiliate in population centers of this importance would seriously affect its competitive position. However, it should be noted that in the population centers of less than 50,000 the Red Network has a total of 45 affiliates; the Blue Network has a total of 68 affiliates, while the Mutual Network has a total of 95 affiliates. Here again the total for the Red and the total for the Blue include 25 stations utilizing both the Red and Blue Networks.

V

Limitations Upon Facilities

The chief factor limiting the numbers of standard broadcast stations in the United States is that of interference. The considerations governing the Federal Communications Commission in determining the amount of interference compatible with the public interest, convenience and necessity are set forth in standards of good engineering prac-

tice promulgated by it. It is contended that the present number of cities in the United States having three or less full-time facilities is the inevitable and unalterable result of physical limitations.

For example, the limitation of facilities in Cleveland, which has three full-time stations and one part-time station, has been cited as an illustration of physical limitation upon possible standard broadcast facilities. However, the Commission has denied applications for additional facilities in Cleveland on the ground of technical limitations where the limitations relied upon have been repeatedly exceeded in subsequent grants in other cities. Indeed, these technical limitations have been exceeded by the Commission in over 40 cases, often to a much greater extent than would be necessary in Cleveland.

In one case filed November 21, 1936, the Commission, on March 9, 1938, denied an application for a regional station in Cleveland. Although the Commission purported to rely on technical grounds, it further held in this case and I quote:

"The area which the station proposes to serve now has program service from a number of existing stations."

[fol. 368] and that:

"No such need is shown for additional broadcasting service as will warrant the establishment of an additional regional station, which because of interference, will be unable to serve as extensive an area as is normally expected to be served by a station of this class."

In another case, decided that same year, 1938, although the Commission found the applicant to be legally, technically and financially qualified to construct and operate the proposed station in Cleveland, it held that:

"The frequencies available for assignment to broadcast stations being limited, public interest would be served by an allocation of licenses to those who will, where need exists, render a broad, general public service."

and the Commission further held that:

"No need exists for an additional station in the area which would be served upon the basis of program service proposed to be rendered."

Therefore the Commission ruled that:

"Public interest, convenience and necessity will not be served by a granting of the application."

In a third case when the application for a regional station in Cleveland was denied on June 29, 1938, the Commission concluded; and again I quote:

"The granting of this application would not cause objectionable interference to any established station. However, interference from existing stations would be expected to limit coverage of the proposed station to its 4.7 millivolt contour at night."

My engineers inform me that this limitation has since been frequently exceeded in other locations.

The Commission went on to say:

"While the evidence indicated that there *may* be need for an additional station in Cleveland, the degree of need shown by the applicant for this station is not of such a convincing and compelling nature as to warrant the Commission in departing so radically from standards of allocation and service which have been established as primary elements in determining whether a particular station would [fol. 369] serve the public interest, convenience and necessity, from the standpoint of the nation as a whole."

There are now applications pending for facilities in Cleveland, according to our examination of the record, the granting of which would give Cleveland six full-time stations. No action has been taken by the Commission on these applications.

If these applications are granted, Cleveland will have ample facilities. But if none is granted, NBC could be required, under the new regulations, to dispose of its only station in Cleveland, Station WTAM, which it has operated in the public interest for twelve years.

As further proof of the fact that there is no absolute limitation upon the possible number of facilities and of the fact that the radio art is dynamic and expanding, Table 1 shows the increase in the number of cities having five full-time stations, Table 2 shows the increase in the number of cities having four full-time stations, and Table 3 shows the increase in the number of cities having three full-time stations, progressively from 1938 to 1941.

TABLE 1

Cities with 5 or More Stations

1938	1939	1940	1941
Boston	•	•	•
Buffalo	•	•	•
Chicago	•	•	•
Cincinnati	•	•	•
Dallas-Ft. Worth	•	•	•
Detroit	•	•	•
Kansas City	•	•	•
Los Angeles	•	•	•
Milwaukee[1]	•	•	•
New York	•	•	•
Philadelphia	•	•	•
Pittsburgh	•	•	•
Portland	•	•	•
San Francisco	•	•	•
Seattle	•	•	•
St. Louis	•	•	•
	Denver	•	•
	Minneapolis-St. Paul	•	•
	New Orleans	•	•
		Baltimore	•
		Bridgeport-New Haven-Waterbury	•
		Springfield-Holyoke[2]	•
		Tacoma	•
		Washington, D. C.	•
			Everett, Wash.

[1] WMAQ, WENR-WLS, WBBM and WGN—Chicago deliver primary service in Milwaukee.

[2] WTIC—Hartford delivers primary service in Springfield-Holyoke.

[fol. 370]

TABLE 2

Cities with 4 Stations

(Absence of ditto denotes transference to Table 1)

1938	1939	1940	1941
Atlanta, Ga.	•	•	•
Hartford	•	•	•
Memphis	•	•	•
Oklahoma City	•	•	•
Salt Lake-Ogden	•	•	•
San Antonio	•	•	•
Baltimore	•		
Minneapolis-St. Paul			
New Orleans			
Richmond, Va.	•		
Washington, D. C.	•		
	Louisville	•	•
	Bridgeport-New Haven-Waterbury		
	Tacoma		
		Akron, O.[1]	•
		Albany	•
		Indianapolis	•
		Providence	•
		Scranton-Wilkes B.	•
		Syracuse	•
		Tampa-St. Pete.	•
		Winston-Salem-HP-G.	•
			Little Rock, Ark.
			Youngstown[2]

[1] WTAM—Cleveland delivers primary service in Akron.

[2] WTAM—Cleveland delivers primary service in Youngstown.

[fol. 371]

TABLE 3

Cities with 3 Stations

(Absence of ditto denotes transference to Tables 1 or 2)

1938	1939	1940	1941
Birmingham	•	•	•
Cleveland	•	•	•
Dayton[1]	•	•	•
Des Moines	•	•	•
Houston	•	•	•
Miami	•	•	•
Nashville	•	•	•
Norfolk[2]	•	•	•
Rochester, N. Y.	•	•	•
Shreveport	•	•	•
Spokane	•	•	
Little Rock	•		
Akron[3]	•		
Albany	•		
Providence	•		
Scranton	•		
Denver			
Bridgeport			
Tacoma			
	Beaumont-Port Arthur	•	•
	Duluth-Superior	•	•
	Fresno	•	•
	Jacksonville	•	•
	Suffolk, Va.	•	•
	Toledo[4]	•	•
	Tulsa	•	•
	Wilmington, Del.[5]	•	•
	Springfield, Mass.		
	Syracuse		
	Tampa-St. Petersburg		
	Winston-Salem, N. C.		
		Chattanooga	•
		Grand Rapids	•
		Knoxville	•
		Omaha[6]	•
		Phoenix	•
		Richmond	•
		San Diego	•
		Wichita	•
		Everett	•
		Augusta, Ga.	
		Worcester[7]	•
			Brownsville, Tex.
			Charlotte, N. C.
			San Juan, P. R.
			Wheeling[8]

[1] WLW—Cincinnati delivers primary service in Dayton.
[2] WRVA—Richmond delivers primary service in Norfolk.
[3] WTAM—Cleveland delivers primary service in Akron.
[4] KFAB—Lincoln delivers primary service in Omaha.
[5] WJR—Detroit delivers primary service in Toledo.
[6] WCAU—Philadelphia delivers primary service in Wilmington.
[7] WBZ—Boston delivers primary service in Worcester.
[8] KDKA—Pittsburgh delivers primary service in Wheeling.

NILES TRAMMELL

Subscribed and sworn to before me
this 10th day of January, 1942.
DOMINICK J. MAGGIPINTO
Notary Public—Richmond County
N. Y. Co. Reg. No. 3M805, Clk's No. 1275
Commission Expires March 30, 1943

[SEAL.]

[fol. 372] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

REPLY AFFIDAVIT OF EDGAR KOBAK

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

Edgar Kobak, being duly sworn, deposes and says:

For approximately the past year and a half I have been Vice President of the National Broadcasting Company, Inc., in charge of sales on the Blue Network. This affidavit is submitted to correct statements made in the affidavit of Fred Weber, submitted on behalf of the Mutual Broadcasting System, Inc., Intervenor, with respect to the Ballantine program and the March-of-Time program.

The Weber affidavit unfairly ascribes practically every piece of business which Mutual has lost to the operation of NBC affiliation contracts. The theory seems to be that otherwise Mutual would have all the business. That is not the fact. The prestige of the networks of the National Broadcasting Company and the audiences attracted by its programs are such that advertisers throughout the years have shown a decided preference for the use of its facilities. The following recital of the two accounts gone into in great detail by Mr. Weber, is to show that in each instance Mutual did not get or keep the business solely and only because the advertisers preferred the NBC networks.

The Weber affidavit is designed to give the further impression that Mutual is in a precarious position, by stressing the fear it has of losing other accounts. The fact of the matter is, of course, that Mutual has a great amount of other business not referred to in the Weber affidavit and currently represents itself as follows:

"In 1940 Mutual billing increased at the fastest rate of any network since 1935. For the *sixth straight* year the curve of this network success was a steady upward line."

On January 8, 1942 Mutual advertised itself as having a 53% gain in total billings in 1941 over 1940.

[fol. 373] The Ballantine Program

NBC's policies as to the acceptance or rejection of programs are constantly being revised. This necessarily is so because changing public tastes and standards require that in a dynamic business the program policies keep pace with such changes. Changes in program policies are not restricted to the commercial field but extend into the sustaining field. So in the matter of beer accounts, NBC did have a policy against such advertising. Before the J. Walter Thompson Company, the advertising agency representing Ballantine & Sons, ever went to the Mutual Broadcasting System, they inquired of NBC whether it would accept beer advertising. NBC at that time informed the J. Walter Thompson agency that it would not. Thereupon, the agency asked NBC to let them know if at any time thereafter NBC changed its policy in regard to beer.

The Ballantine account was not the only beer account that besought NBC to change its policy. These requests caused the NBC makers of policy to review the policy in this regard. Several months thereafter, in fact about the end of October, 1941, NBC decided that it would accept beer accounts on its Blue network. In compliance with the request of the agency, made months before, NBC informed it of this change. Thereupon the agency stated that it would much prefer to be on the NBC Blue network to the Mutual network and had gone to Mutual only because at the time NBC would not accept beer advertising. The Ballantine program thereafter came to the Blue network for the reason that the Blue network was preferable to it over the Mutual network and for no other reason.

The complete answer to Mr. Weber's plaint in this matter that Mutual lost this business because of NBC's option time arrangements is found in the fact that it was necessary for the Ballantine Company to accept delayed broadcasts on seven NBC Blue stations. Even after the scheduling of the Canada Dry program on the NBC Blue, to which Weber refers, Mutual had delayed broadcasts on the Ballantine program on only ten stations. It cannot seriously be contended that the difference between delayed broadcasts on ten as distinguished from seven stations caused this account to shift its advertising.

[fol. 374] The March of Time Program

This program is one of the most interesting news dramatization programs on the air. Mr. Weber fails to point out that it had been on the Blue Network of NBC for a year and a half until the owners of Time, Inc., discontinued radio programs in 1939. When in 1941 Time, Inc., decided to resume its radio program, quite naturally it approached the Blue Network of NBC before it approached Mutual.

NBC had, meanwhile, adopted a policy against the dramatization of war news. Time, Inc. requested NBC to reconsider. While the reconsideration was under way, Time, Inc., negotiated with Mutual. When NBC decided to change its policy in respect of such dramatization, it so informed Time, Inc. and accepted the March of Time program.

NBC did not in any way intimate to Young & Rubicam, the advertising agency for Time, Inc. or to Time, Inc. itself that NBC would attempt to block the scheduling of the March of Time program on the Mutual network. Time, Inc. understandably preferred the Blue Network because among other favorable factors, its program had been broadcast over that network before and it knew what service it could expect from the Blue Network.

The Clark Candy Company program, to which Mr. Weber refers, was scheduled for Thursday night from 8 to 8:30 p. m. on the Blue network before the March of Time program was accepted and without regard to that program. After NBC had accepted the March of Time program, Young & Rubicam asked NBC to request the Clark Candy Company to change its time to 8:30 to 9 p. m. on Thursday nights, following the March of Time program. This request was made because the later period was sufficiently suitable for the Clark Company's desires, whereas it was unsuitable to Young & Rubicam because that agency had another program in the earlier period on another network and did not wish to create competition between its own two programs.

It would be entirely possible to go through each of the other programs referred to by Mr. Weber in his affidavit and show that in each and every instance the reason for the preference for the networks of NBC was the opinion of the advertisers that they are the superior networks and have affiliated with them stations whose good will built up over the years is also of the highest.

The competition for business between all the networks is keen. If NBC's option time arrangements had the effect which Mr. Weber attempts to ascribe to them, it would seem impossible for Mutual ever to get a program so long as there was time available on the NBC Blue. Yet Mutual advertises itself as the fastest growing network.

Edgar Kobak.

Subscribed and sworn to before me this 9th day of January, 1942. Dominick J. Maggipinto, Notary Public, Richmond County. N. Y. Co. Reg. No. 3M805, Clk's No. 1275. Commission Expires March 30, 1943.

[fol. 374a] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HAROLD C. READ, PROGRAM SERVICE MANAGER OF THE LONG LINES DEPARTMENT OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

HAROLD C. READ, being duly sworn, deposes and says:

I am Program Service Manager of the Long Lines Department of the American Telephone and Telegraph Company. On the 25th day of November, 1941, I made an affidavit in the above entitled matter at the request of the Federal Communications Commission relative to the establishment of a network of 64 stations for a one-half hour program once a week giving the charges therefor and information as to the availability of the necessary facilities. [fol. 374b] All the charges included in said affidavit were based on the use of Schedule "B" facilities throughout. It would be possible to establish a network connecting the 64 points in question using a combination of Schedule "B" facilities and facilities of a lower grade, provided the necessary facilities were available, and provided the combination of the facilities would meet the service requirements. The

charges for the lower grade facilities are somewhat lower than the charges for Schedule "B" facilities.

Schedule "B" provides for the occasional use of program transmission facilities and the charge is for a minimum period of one hour. At the same charges mentioned in my said affidavit, two consecutive half-hour programs or four consecutive quarter-hour programs per week could be transmitted assuming the same point of origin, the same network and the same customer.

Schedule "A" provides for the continuous use of program transmission facilities of the same grade as Schedule "B" for contract periods of 16 or more consecutive hours of use per day, for a minimum period of one month. In accordance with the Telephone Company's Tariff F. C. C. No. 198, when, within a period of one month, the charges for any section of a network at Schedule "B" rates equal or exceed those that would be obtained by applying to such section the rates for Schedule "A" facilities and services, such section is charged for in accordance with the rates applicable to Schedule "A". Therefore, the number of hours of Schedule "B" service required by a customer may be sufficient so that at no additional costs he can obtain the facilities for a longer period under Schedule "A", assuming the same point of origin and the same arrangement of facilities. In general, if more than about forty hours per month of Schedule "B" service is taken, the costs to the customer are the same for Schedule "B" as for Schedule "A" service.

We have furnished Schedule "B" service on a recurring basis, on many occasions in the past, to provide program service to numerous stations located in various sections of the country.

[fol. 374c] This affidavit is made at the request of the National Broadcasting Company.

Harold C. Read, Program Service Manager.

Subscribed and sworn to before me this 9th day of January, 1942. William John Keener, Notary Public, Nassau County No. 833. Cert. filed in N. Y. County N. Y. Co. Clk's No. 130, Reg. No. 2K-112. Commission expires March 30, 1942. (Seal.)

[fol. 375] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTIONS TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Upon the complaint herein and upon the annexed affidavits of Telford Taylor, verified the 5th day of November, 1941, and exhibit referred to therein and filed therewith, and of William P. Massing, verified the 5th day of Novemember, 1941, and upon all the other papers and proceedings heretofore filed and had herein, the defendants in the above-entitled cause move this Court to dismiss the complaint or, in the alternative, for summary judgment in their favor.

The grounds of the motions are:

1. The Court lacks jurisdiction of the subject matter of this action either under any special statutory provisions such as are referred to in the preamble to the complaint, or under the general equity jurisdiction of the Court, or otherwise.

2. Insofar as this action is brought under the general equity jurisdiction of the Court rather than under special statutory authorization, this is a suit against the United States and the United States has not consented to be sued.

3. Insofar as this action is brought under the general equity jurisdiction of the Court rather than under special [fol. 376] statutory authorization, this action was improperly brought in the Southern District of New York and cannot properly be brought in the Southern District of New York because the defendants were not and are not inhabitants of the Southern District of New York.

4. Insofar as this action is brought under the general equity jurisdiction of the Court rather than under special statutory authorization, the service on the defendants was invalid because the summons herein was served in the District of Columbia, to which the process of this Court does not extend in this action, and the defendants were not served within the Southern District of New York or within the State of New York.

5. The complaint fails to state a claim upon which relief can be granted.

6. Even if the Court have jurisdiction of the subject matter of this action, the pleadings and other papers on file and the affidavits submitted on these motions and exhibit referred to therein and filed therewith show that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law.

Dated: Washington, D. C., November 7, 1941.

(S.) Samuel Brodsky, Attorney for the United States of America, United States Court House, Foley Square, New York, N. Y. (S.) Telford Taylor, Thomas E. Harris, Attorneys for Federal Communications Commission, 7528 New Post Office Building, Washington, D. C.

IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF TELFORD TAYLOR

DISTRICT OF COLUMBIA, ss:

Telford Taylor, being duly sworn, says:

1. He is General Counsel of the Federal Communications Commission and as such is familiar with the Commission's [fol. 377] proceedings taken under Order No. 37, Docket No. 5060, and that the proceedings include the following:

(a) The Federal Communications Commission on March 18, 1938, by Order No. 37, authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity." On April 6, 1938, a committee of three Commissioners was appointed by the Commission to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission."

(b) Between November 14, 1938, and May 19, 1939, the committee held hearings pursuant to public notice that the

Commission would hear any person or organization desiring to present evidence on the matters included for investigation in Commission Order No. 37. The committee requested the national networks, regional networks, station licensees, and transcription and recording companies to present evidence. It also requested information by questionnaire from licensees of stations and from holders of stock in licensee corporations. In addition, persons and organizations requesting an opportunity to present evidence material to the investigation were given an opportunity to be heard. In all, the committee actually heard witnesses on 73 days during this 6-month period. Ninety-six witnesses were heard. Their evidence fills 8,713 pages of transcript. Seven hundred and seven exhibits were introduced. The testimony and exhibits fill 27 large volumes.

(c) Twenty of the ninety-six witnesses were called by the National Broadcasting Co.; they testified for the equivalent of more than 24 hearing days. Their testimony fills 3,225 of the 8,713 pages of transcript. They introduced 227 of the 707 exhibits. The testimony of one National Broadcasting Company witness, David Sarnoff, president of the Radio Corporation of America and chairman of the Board of the National Brodcasting Company, fills 200 pages.

(d) Seventeen witnesses appeared on behalf of the Columbia Broadcasting System. They testified for the equivalent of more than 16 hearing days. Their testimony fills 2,180 pages of the transcript and they introduced 186 ex-[fol. 378] hibits. The testimony of the president of the Columbia Broadcasting System fills 130 pages of the transcript.

(e) Eight witnesses for the Mutual Broadcasting System testified for the equivalent of more than 6 hearing days, filling 670 pages of the transcript and introducing 53 exhibits.

(f) On June 12, 1940, the committee issued its report based upon the evidence adduced at the hearings and the official records of the Commission.

(g) In November 1940 briefs in the proceeding were filed on behalf of National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System and other interested parties. On December 2 and 3, 1940,

oral arguments before the full Commission were presented by the parties. These arguments were directed to the committee report and to certain draft regulations issued for the purpose of giving scope and direction to the oral arguments. On January 2, 1941, supplementary briefs were filed on behalf of National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System in which were discussed the jurisdiction of the Commission with respect to matters covered by the committee report and the draft regulations, and in which attention was given to the actual and feasible limits of competition in the broadcasting field, with particular reference to network broadcasting.

(h) On May 2, 1941, the Commission issued its report setting forth its findings and conclusions in the proceeding, together with an order adopting eight regulations (Regulations 3.101 to 3.108 inclusive) setting forth policies which the Commission would thereafter apply in exercising its licensing functions. Two of the seven Commissioners filed additional views dissenting from the action taken by the Commission. The effective date of the regulations was deferred for 90 days from the date of the order with respect to existing contracts, arrangements, or understandings, or network organization station licenses, and further provision was made for extension of the effective date of Regulation 3.106 in order to permit the orderly disposition of properties. On June 13, 1941, the Commission provided for the postponement for 90 days from May 2, 1941 of Regulation 3.107, and for further postponement of the [fol. 379] effective date of that regulation in order to permit the orderly disposition of properties. On July 22, 1941, the effective date of the regulations with respect to existing contracts, arrangements, or understandings, or network organization station licenses, or the maintenance of more than one network by a single network organization was again deferred until September 16, 1941, and on August 28, 1941, said effective date was postponed until after the disposition of the petition of the Mutual Broadcasting System to amend Regulations 3.103 and 3.104.

(i) On August 14, 1941, the Mutual Broadcasting System petitioned the Commission to amend two of the regulations, 3.103 and 3.104. Upon this petition the Commission called for briefs and oral argument by interested parties.

Briefs were filed by National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System and by one regional network organization and oral argument was had before the Commission on September 12, 1941. Thereafter, on October 11, 1941, the Commission issued a Supplemental Report on Chain Broadcasting (two of the six Commissioners dissenting) together with amendments to three of the regulations (3.102, 3.103, and 3.104). The Commission simultaneously postponed the effective date of the regulations with respect to existing contracts, arrangements, or understandings, or network organization station licenses until November 15, 1941, and suspended the effective date of Regulation 3.107 indefinitely, with the provision that any subsequent order of the Commission placing Regulation 3.107 in effect should provide for not less than six months' notice and for further extension of its effective date from time to time in order to permit the orderly disposition of properties.

(j) On October 31, 1941, the Commission issued its minute setting forth the procedure to be followed in applying the Chain Broadcasting Regulations. Said minute reads as follows:

"If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the [fol. 380] Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

"The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of

that portion of Regulation 3.106 relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

"The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations."

2. A certified copy of said proceedings before the Commission in connection with Order No. 37, Docket No. 5060, is filed herewith and incorporated herein by reference as Exhibit A.

3. One of the grounds on which plaintiffs contend that the action of the Commission promulgating the Chain Broadcasting Regulations is invalid is that the regulations are "arbitrary and capricious and contrary to the public interest." Affiant submits that Exhibit A is relevant on that issue sought to be raised and that it shows that the regulations are not arbitrary or capricious but that they are in the public interest, and that there is no genuine issue as to any material fact.

(S.) Telford Taylor.

Subscribed and sworn to before me this 5th day of November, 1941. (S.) Pansy E. Wiltshire, Notary Public, D. C. My commission expires October 31, 1945. (Seal.)

[fol. 381] IN DISTRICT COURT OF UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF WILLIAM P. MASSING

DISTRICT OF COLUMBIA, ss:

WILLIAM P. MASSING, being duly sworn, says:

1. I am Acting Secretary of Federal Communications Commission and official custodian of the records of said Commission.

2. I make this affidavit for the purpose of controverting the jurisdiction of the Court insofar as this action is brought under the general equity jurisdiction of the Court.

3. On or about October 31, 1941, an attempt was made to serve what purported to be a summons in the above-entitled action on Federal Communications Commission by leaving a copy thereof at the office of the Secretary of said Commission in the New Post Office Building, Washington, D. C., and no service of a summons in said action has been made on said Commission within the State of New York or within the Southern District of New York, or on any of the members thereof within said State or Southern District of New York or elsewhere.

4. Said Commission and the members thereof are not inhabitants of the State of New York or of the Southern District of New York.

(S.) William P. Massing.

Subscribed and sworn to before me this 5th day of November, 1941. (S.) Pansy E. Wiltshire, Notary Public, D. C. My commission Expires October 31, 1945. (Seal.)

[fol. 381a] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HAROLD C. READ, PROGRAM SERVICE MANAGER OF THE LONG LINES DEPARTMENT OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

HAROLD C. READ, being duly sworn, deposes and says:

I am Program Service Manager of the Long Lines Department of the American Telephone and Telegraph Company. I am in charge of the division of the Long Lines Commercial Department of the American Telephone and Telegraph Company which furnishes to radio-broadcasting sta-

tions and networks facilities for the transmission of programs between various cities in the United States. My functions relative to the furnishing of program transmission facilities are concerned with the commercial aspects of the service and are as follows: to develop and maintain customer contacts, including negotiations with networks and radio [fol. 381b] stations for program transmission service; to cooperate with other Long Lines departments in determining the availability of facilities suitable for the furnishing of program service of the schedule classification desired; to prepare and furnish to customers quotations as to the charges to be applied for the service desired; to furnish the necessary information to other departments for computing service charges for preparing contracts, contract modifications and billing statements for service furnished; to sign contracts and contract modifications and obtain customers' signatures on contracts. I personally participate in negotiations with networks and radio stations relative to program transmission service.

I am generally familiar with the various aspects of the Telephone Company's business relating to the furnishing to networks and radio stations of circuits for the transmission of radio programs to practically every important city in the United States. The circuits required for program transmission service are of various grades, generally of a higher quality than those required for ordinary speech transmission. Specifically, those required for Schedule "B" (the schedule under consideration in this affidavit) are of high quality and require special equipment of many kinds in addition to special operation and supervision in order to insure the transmission with high fidelity of programs between cities. I am familiar with the terms on which the Telephone Company furnishes to the National Broadcasting Company, the Columbia Broadcasting System, and the Mutual Broadcasting System, the circuits by which they distribute their network programs to their various affiliated stations located throughout the country. I have had experience with technical matters in connection with the furnishing of this service to the three nationwide network organizations.

In connection with the furnishing of program transmission facilities to customers of the Telephone Company, I am required to obtain from other departments of the Long Lines Department information with respect to the avail-

ability of facilities, including those furnished by Associate Companies, for the transmission of programs between vari-
[fol. 381c] ous cities of the United States. For the purpose of this affidavit, I have obtained from such other departments of the Long Lines Department the information contained herein with respect to the availability of facilities, including those furnished by Associate Companies, for the program service in question.

I have studied the information contained on the map entitled, "The No. 1 Advertiser Network Possible after August 1—64 Stations." Representatives of the Federal Communications Commission have requested me to state whether or not the Telephone Company has available sufficient program transmission circuits to connect the 64 stations shown on that map and also to state what the charge for the furnishing of such circuits would be. I have been asked to assume that a prospective customer of the Telephone Company desires to broadcast a network program on a nationwide basis. He does not wish to utilize any of the established networks, but he has determined to use the facilities of the 64 stations shown on the map, and he wishes to obtain from the Telephone Company the wire-line facilities necessary for the transmission of his program to those 64 stations. The program the customer has in mind is for one-half hour each Monday evening beginning at 9:00 P. M. Eastern Standard Time, the program to originate in New York City. The customer intends that the program series is to last for one year, but he desires to have an option to cancel the program series at the termination of any 13-week period. Such an arrangement would be satisfactory to the Telephone Company. The customer does not desire permanent lines between the stations but requests program transmission circuits between the 64 stations on a temporary basis for one-half hour per week, the circuits to have a frequency range from approximately 100 to approximately 5,000 cycles per second. Such temporary high quality service is known as Schedule "B" service.

Radio Station WFAA Dallas, Texas and Station KBAF in Fort Worth, Texas are shown on the map in the alternative. I have been informed that those two stations share time and operate on the same frequency. I have been informed further that, pursuant to a time-sharing agreement
[fol. 381d] dated July 29, 1940, Station WFAA is authorized to operate Monday evenings from 6:30 to 9:00 P. M.,

Central Standard Time, which is from 7:30 to 10:00 P. M., Eastern Standard Time. Since the one-half hour from 9:00 to 9:30 P. M., Eastern Standard Time, is the period during which the program is to be broadcast, the facts which I shall furnish will relate to Station WFAA.

At the present time the Telephone Company has available for the service desired the facilities for connecting only 54 stations out of the 64 stations requested. These 54 stations are shown in the list below. Of these 54 stations, 40 would be reached over regularly established program facilities which have been provided for program service, and 14 over facilities normally in the telephone layout for toll service, but which may be made suitable and available for the desired program transmission service.

Service to the 10 remaining stations cannot be provided until the completion of new construction without impairment of message toll telephone service because all existing program transmission circuits over these routes are in use and because message toll telephone traffic is now at an unusually high level. All of these stations are on main toll routes on which construction now under way or definitely planned will make the necessary facilities available. Such construction is planned for completion on the various dates indicated below. It should be pointed out, however, that these dates are subject to variation, dependent upon traffic and construction conditions encountered in the future, and there is no assurance that those facilities will be definitely available on the dates indicated.

A. Stations which would be reached over facilities which have been provided for program service:

Portland, Me.	WCSH	Detroit	WJR
Boston	WBZ	Chicago	WMAQ
Providence	WJAR	St. Louis	KMOX
Springfield, Mass.	WBZA	Dallas	WFAA
Hartford	WTIC	Oklahoma City	WKY
Albany (Schenectady)	WGY	Tulsa	KVOO
New York	WJZ	Wichita	KFH
Philadelphia	WFIL	Kansas City	WDAF

[fol. 381e]

Baltimore	WBAL	Omaha	WOW
Washington	WRC	Albuquerque	KOB
Richmond	WRVA	Portland, Ore.	KQW

Charlotte	WBT	Seattle	KOMO
Atlanta	WSB	Spokane	KHQ
Louisville	WAVE	Des Moines	WHO
Cincinnati	WLW	Minneapolis	WCCO
Cleveland	WTAM	Milwaukee	WTMJ
Pittsburgh	KDKA	Denver	KOA
Buffalo	WBEN	Salt Lake City	KSL
Rochester	WHAM	Los Angeles	KFI
Syracuse	WSYR	San Francisco	KPO

Total—40 Stations.

B. Stations which would be reached over circuits normally in the regular telephone message layout but which can be made suitable and available for program service.

Bangor	WLBZ	Birmingham	WBRC
Roanoke	WDBJ	Columbia	WIS
Orlando	WDBO	Charleston	WCSC
Tampa	WFLA	Jacksonville	WJAX
Miami	WQAM	Houston	KPRC
Chattanooga	WDOD	San Antonio	WOAI
Knoxville	WROL	Duluth	WEBC

Total—14 Stations.

C. Stations which could be connected to the proposed program network upon completion of construction now under way or definitely planned:

		Date Facilities are Expected to be Available
Raleigh	WPTF	4-1-42
Nashville	WSM	7-1-42
Memphis	WMC	5-1-42
Little Rock	KARK	5-1-42
Jackson, Miss.	WJDX	5-1-42
New Orleans	WWL	3-1-42
Shreveport	KWKH	4-1-42
Fargo	WDAY	7-1-42
Bismarck	KFYR	7-1-42
Phoenix	KTAR	5-1-42

Total—10 Stations.

Charges for Program Transmission Service

Exhibit No. 1 and Exhibit No. 2 attached hereto have been prepared in order to illustrate the method utilized by

the Telephone Company in accordance with its Tariff F. C. C. No. 198 in determining the pricing mileage on which the interexchange channel charges for the proposed service are based. The exhibits show the shortest airline mileages between the various stations on the advertiser network. The exhibits represent simply pricing layouts and the lines do not represent the routes of the actual program transmis- [fol. 381f] sion circuits. The charges for these circuits are computed not on the basis of the actual length of the circuits but on the basis of the shortest airline mileage connecting the service and junction points. The cities on Exhibit 1, which are not connected to the network by lines are those which could be connected to the program network only upon the completion of additional construction.

It is assumed that existing local loops already furnished each station connecting each station with the telephone exchange in its city will be utilized and that, therefore, the charges for local loops will be paid by each station and will not be billed to the customer who is requesting the program transmission service.

The total charges applicable at present rates, as filed in Tariff F. C. C. No. 198 of the American Telephone and Telegraph Company, Long Lines Department, for the network comprising the 54 stations to which the Telephone Company could supply program transmission circuits at the present time, are as follows:

a. *Mileage Charges*

Total pricing mileage (layout shown on Exhibit 1) 8,783 airline miles.

Schedule "B" rate per mile per hour or fraction thereof $.20.

Total mileage charges—8,783 x $.20 or $1,756.60 for one-half hour.

This mileage charge would be the same for each weekly half-hour of use.

b. *Switching Charges*

Associated with the first program there would be a switching charge of $.50 per station for disconnecting the local loop at each station at the conclusion of the program.

54 stations x $.50 = $27 switching charge for first program.

Associated with each succeeding program (except the last one) there would be a switching charge of $1 per station—$.50 for connecting the local loop at the start of the program and $.50 for disconnecting the local loop at the conclusion of the program.

54 stations x $1 = $54 switching charge for each intermediate program.

[fol. 381g] Associated with the last program there would be a switching charge of $.50 per station for connecting the local loop at the start of the program. No switching charge would apply for the final disconnection.

54 stations x $.50 = $27 switching charge for last program.

In addition to the above switching charges there will be other charges if rearrangements of existing services are necessary to make the assumed existing local loops available for this service.

c. *Other Charges*

For each station connected, station connection charges would apply as follows:

(1) A charge of $30 per month for each station, applied on a monthly basis only.

54 stations x $30 = $1,620 per month.

(2) A charge of $2.50 per station for each hour or fraction thereof of use.

54 stations x $2.50 = $135 per one-half hour program.

On the above basis the total charges applicable would be as follows:

A. *One program (one-half hour duration)*

Loops (assumed to be existing)	No charge
Mileage (8,783 x $.20)	$1,756.60
Switching (54 x $.50)	27.00
Station connection—Monthly basis (54 x $30)	1,620.00
Hourly basis (54 x $2.50)	135.00
Total	$3,538.60

B. *One Year (52 Programs, one-half hour duration)*

Loops (assumed to be existing)		No charge
Mileage (8,783 x $.20 x 52)		$91,343.20
Switching		
1st Program (54 x $.50)	$27.00	
Intermediate Programs (54 x $1.50)	2,700.00	
Last Program (54 x $.50)	27.00	
		2,754.00
Station connection—Monthly basis (54 x $.30 x 12)		19,440.00
—Hourly basis (54 x $2.50 x		
Station connection—Hourly basis (54 x $2.50 x 52)		7,020.00
Total charge for one year		$120,557.20

One year to have 52 weekly programs would consist of twelve months—four months containing five programs each and eight months containing four programs each. Charges for the circuits for a 54-station network for a month containing five programs and for a month containing four programs would be as follows:

[fol. 381h]	Five Program Month	Four Program Month
Loops (assumed to be existing)	No charge	No charge
Mileage (8,783 x $.20 x 5)	$8,783.00	.....
(8,783 x $.20 x 4)	.....	$7,026.40
*Switching (54 x $1 x 5)	270.00	.....
(54 x $1 x 4)	.....	216.00
Connection (54 x $30)	1,620.00	1,620.00
Operation (54 x $2.50 x 5)	675.00	.....
(54 x $2.50 x 4)	.....	540.00
	$11,348.00	$9,402.40

* Switching charge will be reduced by $27 for first month and $27 for last month since no charge is applied for connecting the local loop to the connection for the first program and no charge is applied for disconnecting the local loop from the connection on the last program.

Charges for Circuits for 64-Station Network

After the circuits for a complete 64-station network could be provided by the Telephone Company, the total charges applicable at present rates as filed in Tariff F. C. C. No.

198 of the American Telephone and Telegraph Company, Long Lines Department, would be as follows:

a. *Mileage Charges*

Total pricing mileage (layout shown on exhibit 2)—10,277 airline miles.

Schedule "B" rate per mile per hour—$.20.

Total mileage charges per hour—10,277 x $.20 or $2,055.40 for ½ hour.

This mileage charge would be the same for each weekly half hour of use.

b. *Switching Charges*

Associated with the first program there would be a switching charge of $.50 per station for disconnecting the local loop at each station at the conclusion of the program.

64 stations x $.50 = $32 switching charge for first program.

Associated with each succeeding program (except the last one) there would be a switching charge of $1 per station —$.50 for connecting the local loop at the start of the program, and $.50 for disconnecting the local loop at the conclusion of the program.

64 stations x $1 = $64 switching charge for each intermediate program.

[fol. 381i] Associated with the last program there would be a switching charge of $.50 per station for connecting the local loop at the start of the program. No switching charge would apply for the final disconnection.

64 stations x $.50 = $32 switching charge for last program.

In addition to the above switching charges there will be other charges if rearrangements of existing services are necessary to make the assumed existing local loops available for this service.

c. *Other Charges*

For each station connected, station connection charges would apply as follows:

(1) A charge of $30 per month for each station, applied on a monthly basis only.

64 stations x $30 = $1,920 per month.

(2) A charge of $2.50 per station for each hour or fraction thereof of use.

64 stations x $2.50 = $160 per program.

On the above basis the total charges applicable would be as follows:

A. *One Program (one-half hour duration)*

Loops (assumed to be existing)	No charge
Mileage (10,277 x $.20)	$2,055.40
Switching (64 x $.50)	32.00
Station Connection—Monthly basis (64 x $30)	1,920.00
Hourly basis (64 x $2.50)	160.00
	$4,167.40

B. *One Year (52 programs, one-half hour duration)*

Loops (assumed to be existing)		No charge
Mileage (10,277 x $.20 x 52)		$106,880.80
Switching		
1st Program (64 x $.50)	32.00	
Intermediate Programs (64 x $1 x 50)	$3,200.00	
Last Program (64 x $.50)	32.00	
		3,264.00
Station Connection—Monthly basis (64 x $20 x 12)		23,040.00
Hourly basis (64 x $2.50 x Station connection—Hourly basis (64 x $2.50 x 52)		8,320.00
Total Charge for one year		$141,504.80

One year covering 52 weekly programs would consist of twelve months—four months containing five programs each and eight months containing four programs each. Charges for a month containing five programs, and for a month containing four programs, would be as follows:

[fol. 381]	Five Program Month	Four Program Month
Loops (assumed to be existing)	No charge	No charge
Mileage (10,277 x $.20 x 5)	$10,277.00	.....
(10,277 x $.20 x 4)	.....	$8,221.60

*Switching (64 x $1 x 5)	320.00	.....
(64 x $1 x 4)	.....	256.00
Connection (64 x $30)	1,920.00	1,920.00
Operation (64 x $2.50 x 5)	800.00	.....
(64 x $2.50 x 4)	.....	640.00
	$13,317.00	$11,037.60

*Switching charge will be reduced by $32 for first month and $32 for last month since no charge is applied for connecting the local loop to the connection for the first program and no charge is applied for disconnecting the local loop from the connection on the last program.

Costs Involved in Changing Origination Point of Program

In connection with changing the origination point of the program, two situations must be distinguished:

(a) Originating the program in its entirety at Los Angeles rather than New York; and,

(b) Providing for the origination of the programs either at New York or at Los Angeles, or part in one city and part in the other, as the individual broadcasts require.

In the case of (a) above, assuming that the weekly program originates in its entirety at Los Angeles rather than New York, the same conditions would apply as in the case of the program originating in its entirety at New York. The same charges would be applicable as in the case of both the 54-station and the 64-station networks set forth above.

In the case of (b) above, using the facilities included in the above charges for both the 54- and 64-station networks, it would not be possible during an individual broadcast to originate part of the program at Los Angeles and part in New York. However, if the customer desired such an arrangement, this could be done by providing an additional circuit from Los Angeles to New York, which is at present available and over which the Los Angeles portion of the program would be sent to New York and transmitted over the network from that point. Such additional circuit for either the 54- or the 64-station network would cost $553.60 for the first weekly program within any given month, this charge being made up as follows:

[fol. 381k]

Local loops (assumed to be existing)	No charge
Mileage Charge (2,438 mi x $.20)	$487.60
Station Connection Charges—Monthly Basis ($30 x 2)	60.00
Station Connection Charges — Hourly Basis ($2.50 x 2)	5.00
Switching Charge (2 at $.50)	1.00
Total	$553.60

For succeeding programs within the same month, the charge would be $494.60 made up as follows:

Local Loops (assumed to be existing)	No charge
Mileage Charge (2,438 mi. x $.20)	$487.60
Station Connection Charges — Hourly Basis ($2.50 x 2)	5.00
Switching Charges (4 at $.50)	2.00
Total	$494.60

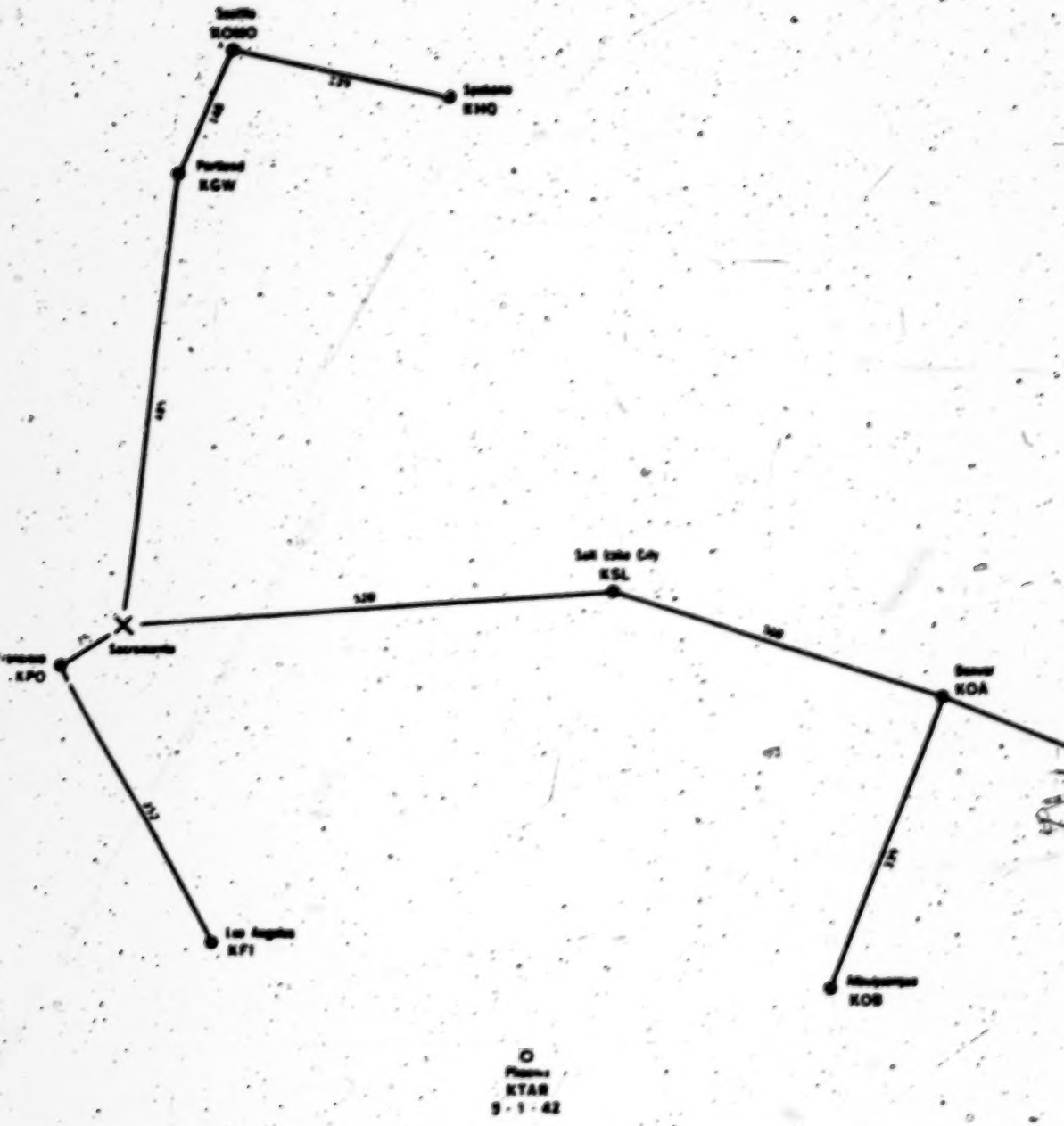
The above statements regarding the availability of circuits are based upon a request for one such network and predicated upon present conditions.

(Signed) Harold C. Read, Program Service Manager.

Subscribed and sworn to Before Me This 25th Day of November, 1941. (Signed) William John Keener, Notary Public, Nassau County No. 833 (Seal.)

Cert. filed in N. Y. County.
N. Y. Co. Clk's No. 130, Reg. No. 2K-112.
Commission expires March 30, 1942.

(Here follow 2 photolithographs, Exhibits 1 and 2, side folios 3811-381m.)

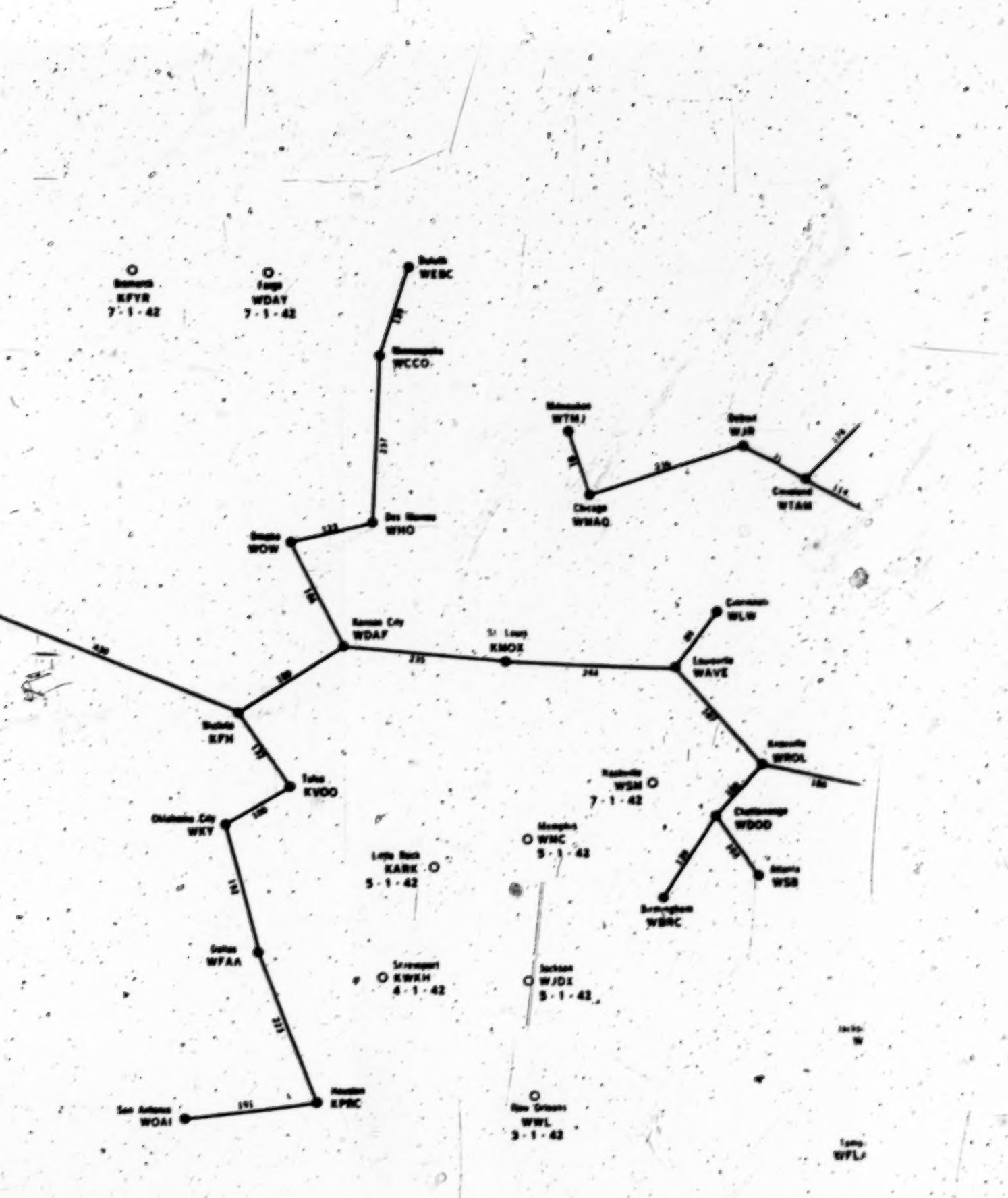


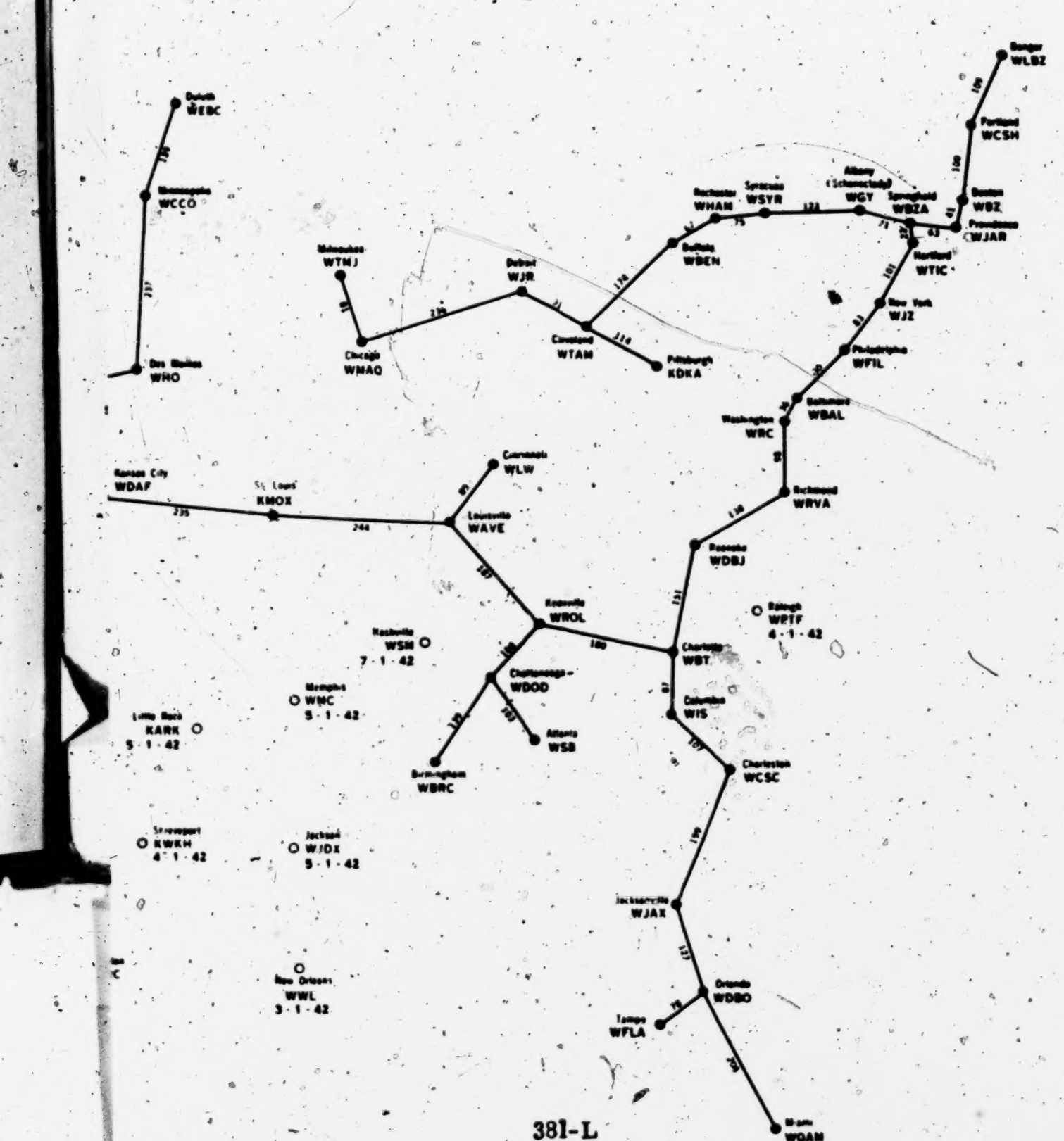
X Junction Points

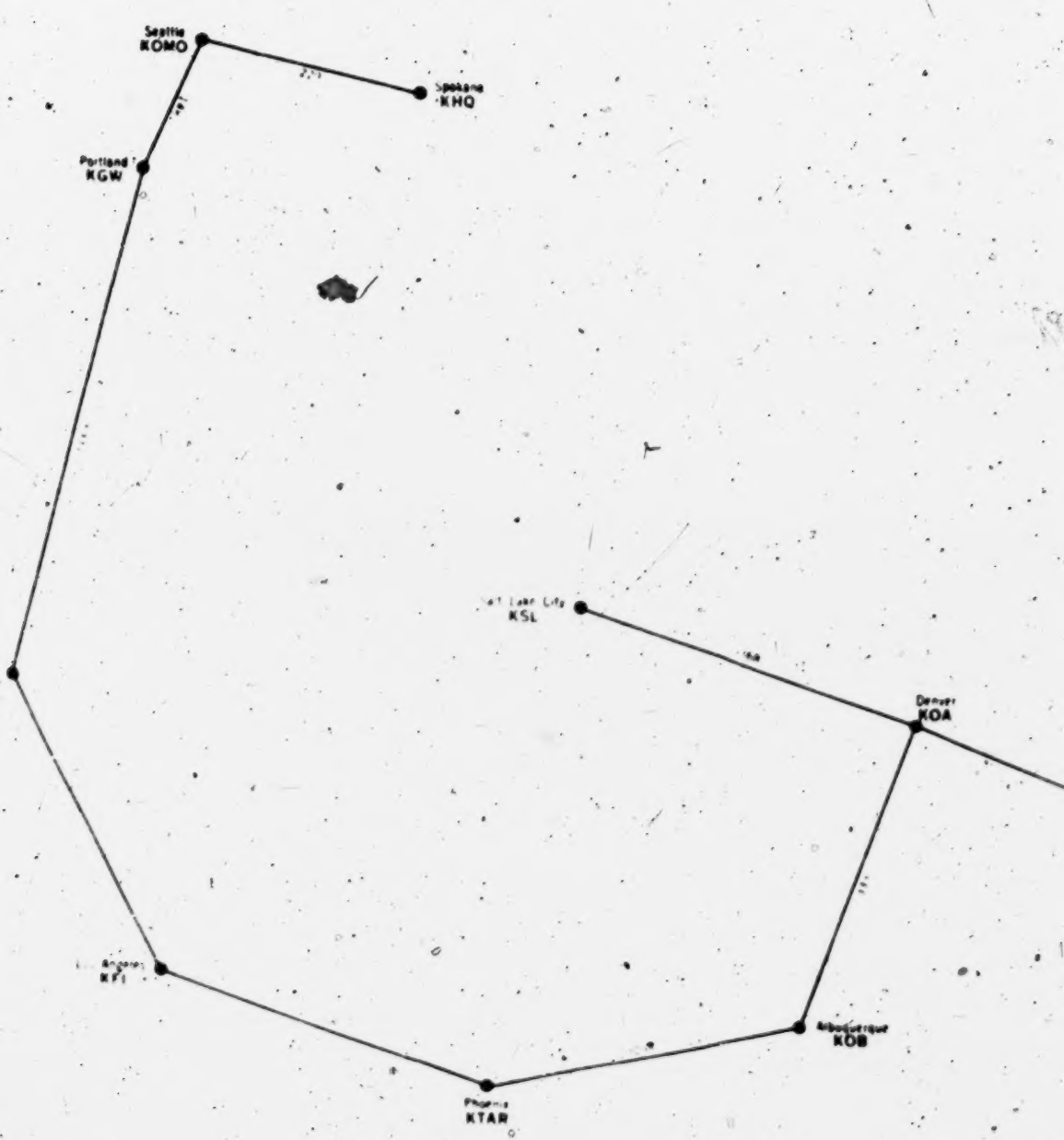
● Service Points

○ Service Points Available by Construction on Date Indicated

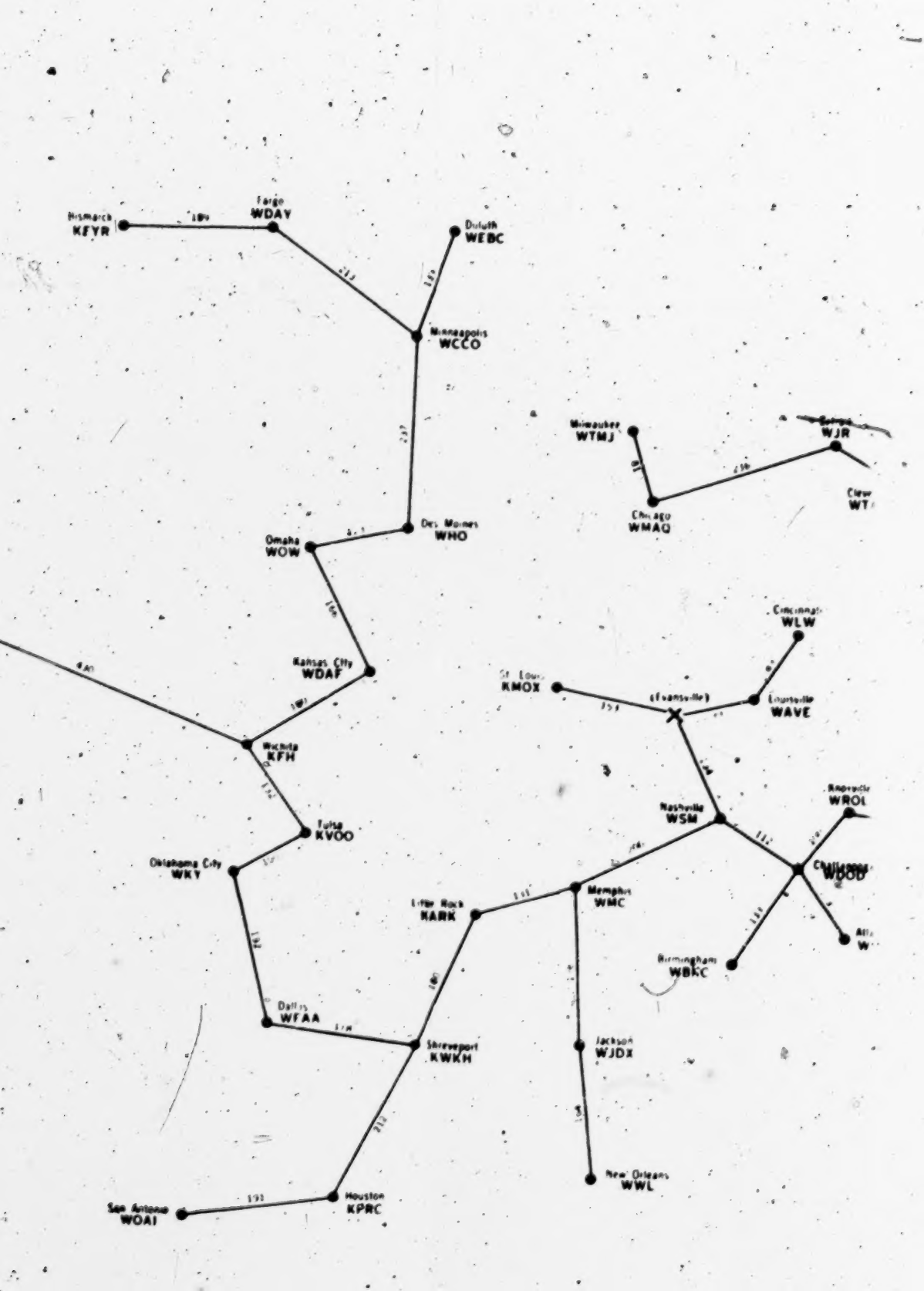
Pricing Mileage - 8783 Air-Line Miles

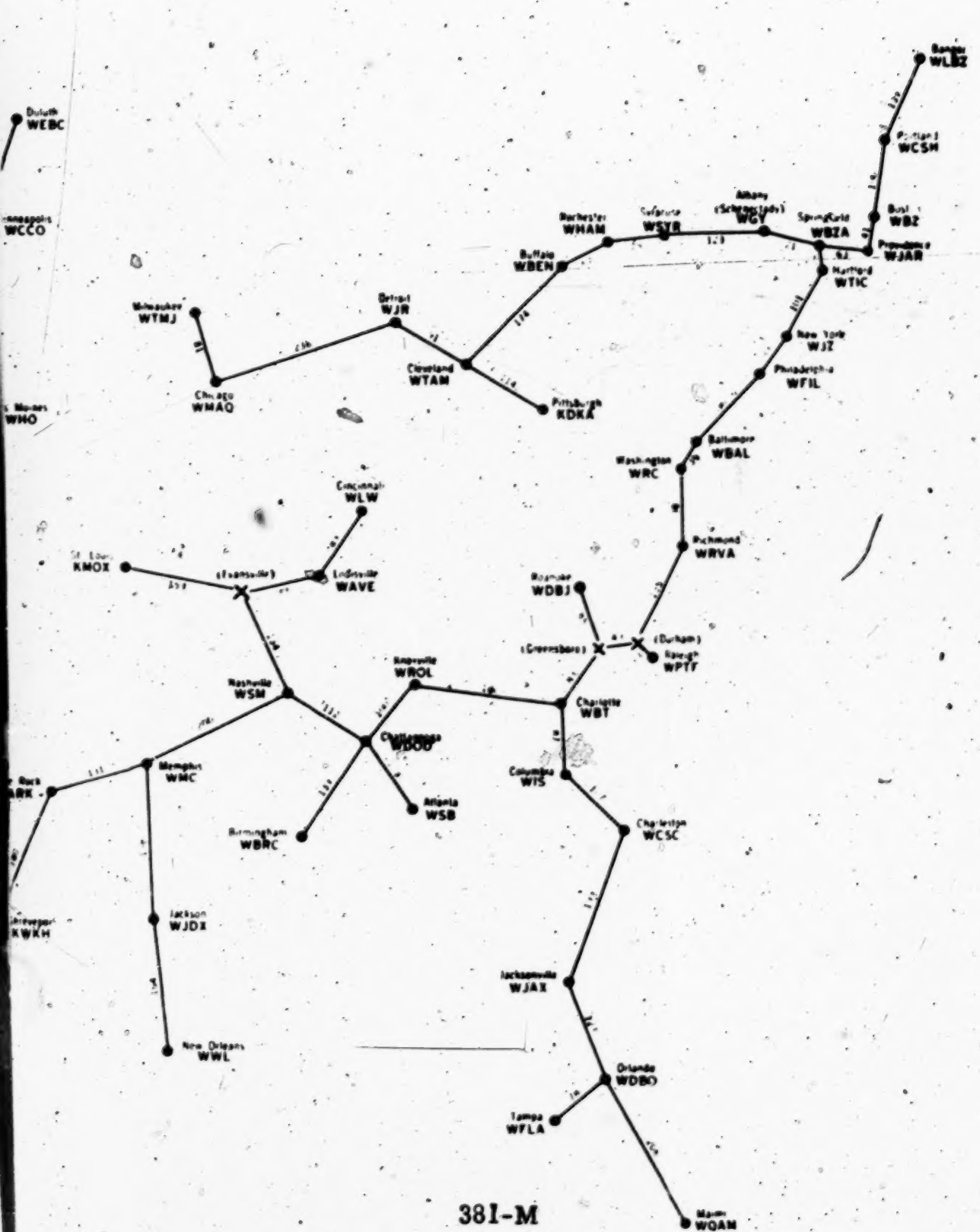

Bismarck
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Fargo
WDAY
7 - 1 - 42
Duluth
WEBC
Minneapolis
WCCO
Des Moines
WHO
Omaha
WOW
Milwaukee
WTMJ
Chicago
WMAQ
Detroit
WJR
Cleveland
WTAM
Kansas City
WDAF
St. Louis
KMOX
Cincinnati
WLW
Louisville
WAVE
Wichita
KFH
Tulsa
KVOO
Oklahoma City
WKY
Little Rock
KARK
5 - 1 - 42
Memphis
WMC
5 - 1 - 42
Nashville
WSM
7 - 1 - 42
Knoxville
WROL
Chattanooga
WDOD
Atlanta
WSB
Birmingham
WBRC
Dallas
WFAA
Shreveport
KWKH
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Jackson
WJDX
5 - 1 - 42
San Antonio
WOAI
Houston
KPRC
New Orleans
WWL
5 - 1 - 42


Duluth
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Minneapolis
WCCO
Des Moines
WHO
Milwaukee
WTMJ
Chicago
WMAQ
Detroit
WJR
Cleveland
WTAM
Pittsburgh
KDKA
Rochester
WHAM
Syracuse
WSYR
Albany
(Schenectady)
WGY
Springfield
WBZA
Boston
WBZ
Providence
WJAR
Portland
WCSH
Bangor
WLBZ
Buffalo
WBEN
Hartford
WTIC
New York
WJZ
Philadelphia
WFIL
Baltimore
WBAL
Washington
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WRVA
Roanoke
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WCSC
Shreveport
KWKH
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Jackson
WJDX
5 - 1 - 42
New Orleans
WWL
3 - 1 - 42
Jacksonville
WJAX
Orlando
WDBO
Tampa
WFLA
Miami
WQAM



X Junction Points
● Service Points
Pricing Mileage 10277 Air Line Miles


Bismarck
KFYR
Fargo
WDAY
Duluth
WEBC
Minneapolis
WCCO
Milwaukee
WTMJ
Chicago
WMAQ
Des Moines
WHO
Omaha
WOW
Kansas City
WDAF
Wichita
KFH
Tulsa
KVOO
Oklahoma City
WKY
Dallas
WFAA
Shreveport
KWKH
Houston
KPRC
San Antonio
WOAI
Little Rock
KARK
Memphis
WMC
Nashville
WSM
Birmingham
WBRC
Jackson
WJDX
New Orleans
WWL
St. Louis
KMOX
Evansville
Louisville
WAVE
Cincinnati
WLW
Knoxville
WROL
Chattanooga
WDOD


Bangor
WLBZ
Portland
WCSH
Boston
WBZ
Providence
WJAR
Springfield
WBZA
Albany
(Schenectady)
WGY
Rochester
WHAM
Syracuse
WSYR
Buffalo
WBEN
Hartford
WTIC
New York
WJZ
Philadelphia
WFIL
Baltimore
WBAL
Washington
WRC
Richmond
WRVA
Roanoke
WDBJ
(Greensboro)
(Durham)
Raleigh
WPTF
Charlotte
WBT
Columbia
WIS
Charleston
WCSC
Jacksonville
WJAX
Orlando
WDBO
Tampa
WFLA
Miami
WQAM
Knoxville
WROL
Nashville
WSM
Chattanooga
WDOD
Memphis
WMC
Atlanta
WSB
Birmingham
WBRC
Jackson
WJDX
New Orleans
WWL
Cincinnati
WLW
Louisville
WAVE
(Evansville)
St. Louis
KMOX
Milwaukee
WTMJ
Chicago
WMAQ
Detroit
WJR
Cleveland
WTAM
Pittsburgh
KDKA
Duluth
WEBC
Minneapolis
WCCO
Des Moines
WHO
Little Rock
KARK
Shreveport
KWKH

[fol. 382] **Plaintiffs' Affidavits in Opposition to Motions to Dismiss Complaint or for Summary Judgment**

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF SIDNEY N. STROTZ, NBC Vice President in Charge of Programs

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

SIDNEY N. STROTZ, being duly sworn, deposes and says:

1. I am employed by National Broadcasting Company, Inc. (hereinafter called "NBC"), one of the plaintiffs in this action, as Vice President in Charge of Programs. In 1933 I was first employed by NBC as Manager of the Program and Artists Service Departments of its Central Division with headquarters in Chicago. In January, 1939, I was appointed Manager of the NBC Central Division and in December, 1939, I became a Vice President of NBC in charge of that Division. I have been in charge of NBC's programs since October 8, 1940.

2. In the course of my employment with NBC since 1933, I have become thoroughly familiar with the programs broadcast by NBC, including those originated and developed by NBC itself and those broadcast by NBC for others.

3. In the preparation of this affidavit, my recollection has been refreshed by compilations of data with respect to the programs broadcast by NBC taken from the NBC records and prepared by the NBC statistical staff.

NBC News Services

4. The greatest achievement of network broadcasting is its service as a means of mass communication on a nationwide and instantaneous basis. This is a notable contribution in time of peace and an imperative necessity in time of war. NBC recognizes, especially in these times of world crisis, that no other phase of its service to the public is more important, that news impartially presented is fundamental and basic to our democratic system.

[fol. 383] 5. News reports as we know them today did not exist on NBC networks at the time of its organization in 1926. The need was soon recognized and by 1932 an average of five hours weekly was devoted to news reports and news summaries. The following table indicates the increasing importance which NBC has placed on this portion of its broadcasting service.

Year	Number of News Program Hours	News as Percent of Total Program Hours
1926		
1932	254	2.0
1936	705	3.6
1940	1436	8.0
1941 (estimate)	1703	8.8

6. Eloquent testimony of the importance placed on news broadcasts comes daily by letters from families in remote areas and isolated places. There are vast stretches of this country containing millions in population entirely dependent on the radio news services for their information as to current events. In times such as these, the radio newscaster is listened to regularly and faithfully. In the great rural districts thousands of farm families have as practically their only contact with the outside world for months at a time the news messages coming through the loud speaker. The whole world is brought to their door via live broadcasts from the furthermost cities of the globe. The craving for news of what is happening in this country and throughout the world is found among all types of people, regardless of economic status, age, education, or political inclination, and they depend on radio as a principal source of news.

7. In its dissemination of news NBC makes use of the services of established news-gathering agencies which are equally available to the press, including AP, UP and INS. These news summaries are scheduled at frequent intervals throughout the day and evening (schedule attached hereto as Exhibit "A") and, almost without exception, presented just as they came from the news tickers without change or addition.

8. Numerous commentators are heard on NBC networks usually with expanded resumés and interpretations of lat-

[fol. 384] est developments. To keep the nation informed as to what is going on in other parts of the world NBC maintains an extensive staff of overseas reporters whose daily accounts are shortwaved and rebroadcast for U. S. listeners.

Up to the participation of the United States in the war, NBC maintained its own correspondents in each of the following 26 foreign cities:

Brazzaville, Fr. French Africa	Reykjavik, Iceland
Juneau, Alaska	Rome, Italy
Buenos Aires, Argentina	Tokio, Japan
Sydney, Australia	Manila, P. I.
Batavia, Java	Mexico City, Mexico
Shanghai, China	Panama City, Panama
Chungking, China	San Juan, Porto Rico
Bogota, Columbia	Kouibyshev, Russia
Cairs, Egypt	Singapore
London, England	Stockholm, Sweden
Helsinki, Finland	Berne, Switzerland
Vichy, France	Ankara, Turkey
Berlin, Germany	Caracas, Venezuela

Since the outbreak of war, of course, NBC's correspondents in enemy countries have not been permitted to broadcast or transmit news.

9. Supplementing these regular news sources NBC has established its own listening post where a twenty-four hour daily vigil is kept by a corps of specially trained linguists whose duty it is to listen to foreign short wave broadcasts. Their reports are flashed to NBC's News Room and made available to press associations throughout the country.

10. The broadcast accounts of events as they are actually happening is a form of news reporting unique to network radio. NBC has brought on-the-scene word pictures wherever world news events were taking place and as history was being made. When Japan abruptly terminated her negotiations with our government by a devastating bombing raid on our Pacific Base at Pearl Harbor, December 7, 1941, the news was flashed by radio to the NBC listening audience within thirty minutes. Throughout the day and night, programs were interrupted with reports of latest

[fol. 385] developments and interpretations of what was happening. One the following day the momentous message of President Roosevelt informed the world by radio of our country's declaration of war against Japan. The broadcasts in connection with the opening of hostilities with Japan exemplify the type of public service NBC stands prepared to render twenty-four hours a day. Exhibit B annexed hereto contains examples of outstanding news events of the type broadcast by NBC.

NBC Public Discussion Programs

11. The fact that radio in this country is self supporting through the sale of time to advertisers means, among other things, that NBC can thereby provide the opportunity for the free expression of opinion on questions of national interest. This distinguishes the American system from that of most other nations. Regardless of the administration in office, the company has always made its facilities available to the government for the expression of its views and has given similar opportunities to the opposition to voice its opinions in order that a fair presentation of public questions can be made.

12. Officials of our government, the President, Cabinet officers, members of Congress, State representatives, leaders of the educational, social, and religious forces, all are afforded the facilities of NBC's nationwide organization to express their views and keep the public informed. Increasing use of network broadcasting has been made by the President, the familiar fireside chats making it possible for the Chief Executive to talk directly into the homes of the nation. Representatives of all governmental departments and agencies have been granted NBC time to discuss at first hand the developments within their own fields of responsibility. The following list is indicative of the use of time on NBC in 1941 by officials of the Federal government:

	Number of Radio Speeches
President Roosevelt	21
Vice President and Cabinet Members	106
Congressmen	215

13. In the direction of its efforts toward the enlightenment of the public on all important governmental, political,

[fol. 386] and economic questions, NBC has provided for the open discussion of all sides of controversial issues. As long ago as 1932 the National Radio Forum was established by NBC in cooperation with the Washington Evening Star. The "University of Chicago Round Table Discussions" have been a feature broadcast on NBC since 1933 presenting in an informal, unrehearsed manner, opposing views of questions of the day. During its six years on NBC "America's Town Meeting of the Air" has become one of the most unique and outstanding forum programs on the air. It is NBC's policy and its earnest endeavor to grant equal facilities to groups and individuals in the presentation of conflicting opinions on such controversial issues as the Supreme Court case, the Lease-Lend Bill, the Neutrality Act, etc. Attached as Exhibit "C" is a list of the forum and discussion programs on NBC networks in 1941.

14. During 1940 NBC has made available 1,220 program hours or 9.6% of all its sustaining program time for broadcasts in behalf of various organized groups representing business, charity, education, government, labor, etc. This imposing list (copy of which is attached) indicates that three hundred and fifty two separate organizations were provided time as follows:

Organization	Number of Organizations	Total Program Time Hours Mins.
Business	44	53:29
Charity, etc.	23	32:21
Civic	30	47:38
Cultural	46	201:02
Educational	70	144:12
Farm	3	248:40
Governmental	24	97:13
Labor	11	8:21
Patriotic	17	16:47
Political	44	131:54
Religious	23	204:20
Scientific	17	34:10
Total	352	1220:07

These organizations are identified in Exhibit "D", attached hereto.

[fol. 387] 15. NBC's concept of its responsibility in the field of public service extends to a wide variety of program types; in terms of program time these broadcasts account for 35% of the total program day. In addition to news and special events broadcasts, talks, forum discussions, etc., the field of NBC activity includes presentation of the world's finest music and drama, the cooperation with the Government Parent Teacher and Women's organizations in the presentation of programs of special interest to women and children. Opportunity is granted the three major religious faiths for programs on a regular weekly schedule. Six days each week the NBC in cooperation with the Department of Agriculture presents the National Farm and Home Hour, a program dedicated to the service of American agriculture, now in its thirteenth consecutive year. A list of outstanding NBC public service programs is attached hereto as Exhibit E.

16. NBC is proud of its record of fifteen years of public service. In the crisis of the war which is upon us, NBC stands ready to devote its facilities to whatever use will best serve the interests of national defense and our ultimate victory. NBC hopes to continue to operate on the high plane of public responsibility which it has always maintained toward the government and the people.

Sidney N. Strotz.

Subscribed and sworn to before me this 3rd day of January, 1942. Florence E. Marger, Notary Public. (Seal.)

Queens Co. No. 2625, Reg. No. 6868.
Cert. filed in N. Y. Co. No. 573, Reg. No. 3-M-369.
Commission Expires March 30, 1943.

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EXHIBIT "A" TO AFFIDAVIT

Regularly Scheduled News Broadcasts on NBC Red & Blue Networks as of December 5, 1941

Red Network

Time (Est)	Program	Schedule
8:00– 8:05 AM	News Summary	Sunday
8:00– 8:15 AM	European News Roundup	Mon thru Sat
8:00– 8:15 AM	Clifton M. Utley (Skelly Oil Co.)	Mon thru Fri
8:45– 9:00 AM	News Summary	Mon thru Sat
9:00– 9:15 AM	European News Roundup	Sunday
11:00–11:05 AM	News Summary	Sunday
1:00– 1:15 PM	Upton Close	Sunday
1:45– 1:50 PM	News Summary	Mon thru Fri
3:15– 3:30 PM	H. V. Kaltenborn	Sunday
6:25– 6:30 PM	News Summary	Mon thru Sat
7:15– 7:30 PM	News of the World (Miles Labs.)	Mon thru Fri
7:45– 8:00 PM	Kaltenborn Edits the News (Pure Oil)	Tues—Thurs—Sat
11:00–11:15 PM	News Summary	Daily
11:15–11:30 PM	Story Behind the Headlines	Sunday
12:00–12:05 AM	News Summary	Daily
12:55– 1:00 AM	News Summary	Daily

[fol. 431]

Blue Network

Time (Est)	Program	Schedule
8:00– 8:05 AM	News Summary	Sunday
8:00– 8:15 AM	European News Roundup	Mon thru Sat
8:55– 9:00 AM	News Summary	Mon thru Sat
9:00– 9:15 AM	European News Roundup	Sunday
10:15–10:30 AM	Helen Hiett	Mon thru Fri
11:00–11:05 AM	News Summary	Sunday
1:45– 1:50 PM	News Summary	Mon thru Fri
4:45– 5:00 PM	News Summary	Mon thru Fri
6:30– 6:45 PM	Pearson and Allen (Health aids Inc.)	Sunday
6:45– 7:00 PM	Over Our Coffee Cups (Pan American Coffee Bureau)	Sunday
6:45– 7:00 PM	Lowell Thomas (Sun Oil Company)	Mon thru Fri
7:00– 7:30 PM	European News Roundup	Sunday
7:45– 8:00 PM	Upton Close	Wednesday
7:45– 8:00 PM	Edward Tomlinson	Saturday
8:00– 8:15 PM	Edward Tomlinson	Friday
8:00– 8:30 PM	March of Time (Time Inc.)	Thursday
9:00– 9:15 PM	Walter Winchell (Jergens Company)	Sunday
9:00– 9:15 PM	News Here and Abroad (Trimount Clothing Co.)	Thursday
9:55–10:00 PM	Smith Brothers News (Smith Brothers)	Friday
10:30–10:45 PM	Ahead of the Headlines (Weekly Publications)	Wednesday
10:30–10:45 PM	News Here and Abroad	Mon—Tues—Fri
11:00–11:05 PM	News Summary	Sunday
12:00–12:05 AM	News Summary	Daily
12:55– 1:00 AM	News Summary	Daily
1:00– 1:05 AM	Baukhage (National Farm and Home Hour)	Mon thru Fri

[fol. 389] EXHIBIT "B" TO AFFIDAVIT

Examples of Outstanding News Events Broadcast by NBC Networks

1927 (August 7)	Dedication of the International Peace Bridge at Niagara Falls to the continuation of peaceful international relations.
1928 (June 12–15)	Complete coverage of Republican National Convention in Kansas City.
1928 (June 26–29)	Complete coverage of Democratic National Convention in Houston Texas.
1928 (December 10)	Opening of International Conference of American States in Pan American Building.
1929 (March 4)	Inauguration Ceremonies of President Hoover and Vice President Curtis. For the first time in history, microphones were placed in the Senate Chambers where the Vice President was inaugurated.
1930 (January 21)	Opening session of the London Naval Parley; Speakers—King George V, Ramsey McDonald, Secretary Stimson, Henri Tardieu, Dino Grandi.
1930 (October 30)	London England—The Prince of Wales address before the League of Nations dinner to delegates at the British Imperial Conference.
1931 (September)	Geneva, Switzerland — Complete coverage of the Geneva Peace Conference.
1931 (June and July)	Pick-ups from around the world covering the flight of Post and Gatty.
1932 (January 20)	Mukden Manchuria—General Shigeru Honfo, leader of Japanese Military Forces, and Floyd Gibbons broadcasting from the battlefields of Manchuria.
1932 (January 31–March 13)	Geneva Switzerland—World Disarmament Conference —Official opening address and forty talks by William Hard.
1932 (June 27–July 2)	Complete coverage of Democratic National Convention held in Chicago, Illinois.
1932 (June 14–June 16)	Complete coverage of the Republican National Convention held in Chicago, Illinois.
1932 (October 15)	Rome Italy—Address by Guglielmo Marconi, Marking the Tenth Anniversary of Fascism.
1933 (May 17)	Berlin Germany—Address of Chancellor Adolph Hitler delivered before the German Reichstag announcing Germany's foreign policy under the Nazi regime.
1933 (June 12)	London England—Opening of the World Economic and Monetary Conference.
1933 (March 12)	First Fireside talk by President Roosevelt.
1934 (January 3)	Ceremonies of the opening of the second session of the 73rd Congress.
1934 (May 31)	Complete description of President Roosevelt's review of the United States Battle Fleet.
1935 (September 13)	Talk by Haille Selassie from Addis Ababa in connection with the Ethiopian-Italian War.

[Col. 390] EXHIBIT "B" TO AFFIDAVIT—Continued

1935 (August 20–28)	Most extensive field broadcast hoookup in radio history of the Army Maneuvers at Pine Camp, New York.
1936 (Nov. 6–Dec. 23)	Pan American Peace Conference held in South America and attended by various dignitaries including President Roosevelt.
1936 (June 9–12)	Complete coverage of the Republican National Convention held in Cleveland.
1936 (June 23–27)	Complete coverage of the Democratic National Convention held in Philadelphia.
1937 (September 11)	Broadcast by Madame Chiang Kai-Shek on the war situation in China.
1937 (May 12)	Coronation of King George VI and Queen Elizabeth of England.
1938 (March 12)	Complete coverage of the absorption of Austria by Germany including such broadcasts as Hitler's first entrance into Austria at Linz.
1938 (September 16)	Description of the arrival of Prime Minister Chamberlain in London after his first meeting with Hitler.
1938 (September 29)	From Munich, Germany, first official reading of the Four Power Pact.
1939 (February 9)	Tolling of Chimes and description followed by the announcement of the passing of Pope Pius XI.
1939 (March 2)	From Vatican City—announcement of Election of Pope Pius XII.
1939 (September 23–27)	Broadcasts in connection with the Pan American Peace Conference held in Panama City.
1939 (March 23)	From Memel, arrival of Hitler—description of scene followed by talk of Herr Hitler.
1939 (August 31)	Berlin Germany—Spokesman for German Press gave the sixteen points in Hitler's proposal for settlement of Danzig and Polish corridor (first word of Hitler's official demands upon Poland).
1939 (September 3)	London, England—Prime Minister Chamberlain from Ten Downing Street declared England at war with Germany. Paris, France—Premier Deladier declaration of war.
1939 (December 17)	Montevideo, Uruguay—First actual description of a scuttling of a ship in war time. The German war ship Graf Spee was scuttled and sunk.
1940 (June 10)	Rome, Italy—Premier Mussolini declared war on the Allies.
1940 (June 21–22)	Compeigne Forest, France—description of Armistice proceedings between Germany and France.
1941 (January 20)	Complete description of the Third Inauguratoin of Franklin D. Roosevelt as President of the United States.
1941 (August 14)	London, England—Major Clement J. Atlee read the joint declaration—eight point resolution established by the Roosevelt-Churchill Atlantic meeting.
1941 (December 8)	President Roosevelt's joint message to Congress asking for a declaration of war on Japan.

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EXHIBIT "C"

Forum and Discussion Programs on NBC Networks in 1941

Program	Network	Time
National Radio Forum (since June 1933) Discussions of vital problems facing the American people by representatives of our government and authoritative speakers.	Blue	Monday 9:00-9:30 PM
America's Town Meeting of the Air (since May 1935) Forum broadcast direct from the floor of Town Hall, New York, presenting leaders in various fields of thought in American political and economic life in discussions of current problems under the auspices of Town Hall, Inc.	Blue	Thursday 9:15-10:15 PM
University of Chicago Round Table (since Oct. 1933) Non-partisan discussions of current topics of political, economic, social and international interest by members of the University of Chicago faculty, produced in cooperation with the University Broadcasting Council.	Red	Sunday 2:30-3:00 PM
Foreign Policy Association (1929-1933) (since Oct. 1939) Authoritative speakers on our international relations.	Blue	Sunday 12:00-12:15 PM
Wake Up America (since Sept. 1941) Forum program produced in cooperation with the American Economic Foundation and presenting two outstanding speakers discussing important economic issues.	Blue	Sunday 2:00-3:00 PM
Republican Club Saturday Discussions (since Jan. 1938) Discussions on current economic, social and international problems facing America by leading Republican figures.	Red	Saturday 1:30-2:00 PM
American Education Forum (Oct. 1935-April 1941) Discussion of controversial issues in education by leading professors and arranged by the American Education Committee.	Blue	Saturday 12:00-12:25 PM

EXHIBIT "D" TO AFFIDAVIT

NBC Network Program Time in Behalf of Various Organizations
Year 1940

During the year 1940 NBC supplied 12,405 hours of sustaining program service to the Red, Blue, Pacific Red and Pacific Blue networks. Of this amount, this report reveals that 1,220 hours or 9.6 percent of the sustaining total were broadcast in behalf of business, charitable, civic, educational, farm, government, labor, patriotic, political, religious and scientific organizations.

Organization	Number of Organizations	Total Time Hrs.:Min.	% of Total Organization Time
Business	44	53:39	4.4
Charity, etc.	23	32:21	2.6
Civic	30	47:38	3.9
Cultural	46	201:02	16.5
Educational	70	144:12	11.8
Farm	3	248:40	20.4
Governmental	24	97:13	8.0
Labor	11	8:21	.7
Patriotic	17	16:47	1.4
Political	44	131:54	10.8
Religious	23	204:20	16.8
Scientific	17	34:10	2.8
Total	352	1,220:07	100.00

Research Division Sept. 23, 1941

1. 3921

Alphabetical List of Organizations Using NBC Networks 1940

Organization	Classification	Total Time Hr.	Min.
ademy of Political Science	Educational	1	00
vanced School of Education (see Columbia University)			
vertising Club of New York	Business	1	26
vertising Women of New York	Business		30
ricultural Marketing Service (see Dept. of Agriculture)			
r Youth of America	Educational	1	45
algamated Clothing Workers (see Congress of Industrial Organizations)			
nerican First Committee	Political		15
nerican Academy of Ophthamology & Otolarnygology	Scientific		15
nerican Association for Adult Education Inc.	Educational	18	30
nerican Association for the Advancement of Science	Scientific	2	30
nerican Association for Health, Physical Education & Recreation (see Natl. Education Association of U. S.)			
nerican Association of Museums	Cultural	4	00
nerican Association of School Administrators	Educational		42
nerican Bar Association	Business		14
nerican Civil Liberties Union	Political		45
nerican Coalition of Patriotic Societies	Patriotic		27
nerican College Publicity Association	Educational		30
nerican College of Surgeons	Scientific		12
nerican Council on Education	Civic	1	30
nerican Defense Society	Political		30
merican Design Award (see Lord & Taylor)			
merican Dental Association	Scientific		40
merican Education Committee	Educational	12	05
merican Farm Bureau Federation	Farm		30
merican Federation of Labor	Labor	4	15
merican Good Government Society	Patriotic		45
merican Historical Association	Educational	8	45
merican Hospital Association	Charitable		15
merican Jewish Congress	Religious		30
merican Jewish Joint Distribution Committee	Charitable		30
merican Labor Party	Political		39
merican Law Institute	Civic	3	15
merican Legion	Patriotic	7	08
merican Legion Auxiliary	Charitable		15
merican Library Association	Educational	1	15
merican Medical Association	Scientific	13	15
merican Museum of Natural History	Scientific		15
merican Museum of Natural History in N. Y. (see Museum of Science & Industry in Chi.)			
merican Pharmaceutical Association	Business		14
merican Philosophical Society	Educational		34
merican Red Cross	Charitable	11	38
merican Retail Federation	Business		15
merican Road Builders Association	Business		15
merican Scientific Congress (see Pan-American Union)			
merican Society for the Control of Cancer	Charitable		30
merican Society of Internation Law	Business		30
merican Society for the Prevention of Cruelty to Animals	Civic		30
merica's Town Meeting of the Air (see Town Hall, Inc.)			
merican Vocational Guidance Society	Educational		15
merican Woman's Association	Civic		25

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Organization	Classification	Total Time Hr.	Min.
American Youth Commission (see American Council on Education)			
American Youth Congress	Political	1	54
Animal Looks at the World (see American Museum of Natural History)			
Argentine Meteorological Expedition	Scientific		10
Army Information Service (see Dept. of War)			
Army Maneuvers (see Dept. of War)			
Art for Your Sake (see National Art Society)			
Art of Living (see Federal Council of Churches of Christ in America)			
Ashland Ohio Symphony Orchestra	Cultural		30
Book Week Committee Inc.	Cultural	1	00
Boy's Club	Civic		15
Boy Scouts	Civic	1	00
British War Relief Society	Charitable		30
Buhl Planetarium	Scientific		15
California Alumni Association University Explorers	Scientific		30
California Institute of Technology (see Stanford University)			
Call to Youth (see Federal Council of Churches of Christ in America) (see Natl. Council of Catholic Women) (see Union of American Hebrew Congregation)			
Calling All Stamp Collectors (see Natl. Federation of Stamp Clubs)			
Catholic Charities	Charitable		45
Catholic Hour (see Natl. Council of Catholic Men)			
Central City Play Festival	Cultural	1	00
Chautauqua	Cultural	7	00
Chicago Ban Association	Business		30
Chicago Better Business Bureau	Business		30
Chicago City Opera	Cultural	1	00
Chicago Motor Club	Business		15
Chicago Philharmonic	Cultural	1	30
Chicago Symphony	Cultural	3	43
Child Grows Up (see Dept. of Labor)			
Childrens Book Week (see Book Week Committee Inc.)			
Children's Crusade for Children	Charitable	1	40
China Aid Council	Charitable		30
China Emergency Relief Committee	Charitable		15
Christian Foreign Service Convocation (see Foreign Missions Conference of North America)			
Christian Science Committee on Publications	Religious		45
Cincinnati Bach Society	Cultural	1	00
Cincinnati Summer Opera Association	Cultural	1	40
Cincinnati Symphony	Cultural	1	40
Citizens Committee of 1,000	Political		15
Citizenship Educational Service Inc	Patriotic		05
Civil Aeronautics Authority	Governmental		15
Civil Service Commission	Governmental		13
Civilian Conservation Corps	Governmental		27
Cleveland Symphony Orchestra	Cultural		30
Coast Guard (see Dept. of Treasury)			
Columbia University	Educational	1	03
Committee to Defend America by Aiding the Allies	Political		54
Committee to Defend America by Keeping out of War	Political		13
Communist Party of the U. S.	Political		30

ol. 39:4] Organization	Classification	Total Time Hr.	Min.
ommunity Chest & Councils Inc	Charitable	1	00
ongress of Industrial Organizations	Labor	2	56
onsumers Council (see Dept. of Interior)			
oolidge, (Elizabeth Sprague) Foundation	Cultural	2	30
oronado Exposition Commission	Governmental	2	00
ouncil Against Intolerance in America	Educational		15
urtis Institute of Music	Cultural	3	30
aughters of American Revolution	Patriotic		35
emocratic National Committee	Political	41	42
emocratic State Committee	Political	1	00
epartment of Agriculture	Farm & Governmental	268	50
epartment of Interior	Governmental		15
(see General Federation of Women's Clubs)			
epartment of Justice	Governmental	3	00
epartment of Labor	Governmental	13	55
epartment of the Navy	Governmental	2	51
epartment of State	Governmental		15
epartment of Treasury	Governmental		45
epartment of War	Governmental	4	13
etroit Symphony	Cultural		30
octor's at Work (see American Medical Association)			
ouglas County of Nebraska Republican Women's Club	Political		43
rug Topics	Business		25
astman School of Music	Cultural	11	30
conomic Club of New York	Business	1	01
l Paso County Ministerial Alliance	Religious		30
ngineering Society of Western Pennsylvania	Business		30
nglish Speaking Lodges of the Croation Fraternal Union of America	Patriotic		15
nglish Speaking Union of the United States	Educational		15
ahnstock Expedition	Scientific		43
arm & Home Hour			
(see U. S. Dept. of Agriculture)			
(see Co-operating Governmental Agencies)			
ederal Bar Association	Business		27
ederal Communications Commission	Governmental		43
ederal Council of Churches of Christ in America	Religious	134	45
ederal Works Agency	Governmental		46
ederation of Young Republican Groups of Greater N. Y.	Political		15
ederation for Support of Jewish Philanthropic Societies	Charitable		31
ield Museum of Natural History in Chicago	Scientific	7	00
irst Aid Week (see National Association of Retail Druggists)			
irst General International Conference of the Methodist Church	Religious		30
oreign Missions Conference of North America	Charitable		30
oreign Policy Association	Educational	12	00
riday Night Army Show (see Dept. of War)			
riends of Library (see American Library Association)			
ront Page Ball (see New York Newspaper Women's Club)			
allant American Women (see U. S. Office of Education)			
eneral Electric Research Laboratory	Business		45

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Organization	Classification	Total Time Hr.	Min.
General Federation of Women's Clubs	Civic	20	00
General Motors	Business		30
Geographical Society of America	Scientific		15
Girl Reserve Secretaries (see Y. W. C. A.)			
Girl Scouts	Civic		30
Goddard College	Educational		15
Gold Star Mothers	Patriotic		30
Golden Rule Foundation	Civic		30
Governors Conference	Civic		15
Government Committee for National Art Week (see Federal Works Agency)			
Grand Jury Association of New York County	Civic		30
Greater New York Federation of Churches	Religious	1	00
Greater New York Fund	Charitable	5	00
Greater New York Safety Council	Civil		05
4-h Club	Farm		25
Hadassah	Religious		25
Highlights of the Bible (see Federal Council of Churches of Christ in America)			
Hi-Y Congress (see Y. M. C. A.)			
Howard University	Educational		30
How Do You Know (see Field Museum of Natural History in Chicago)			
I Am An American Citizenship Foundation	Patriotic		31
"I Am an American"—series (see Dept. of Justice & Dept. of Labor)			
Illinois Manufacturing Association	Business		29
Indiana Editorial Association	Political		30
Indiana Republican Organization	Political		30
Institute of Public Affairs	Civic		29
International Association Printing House Craftsmen	Labor		30
International Brotherhood of Teamsters, Chauffeurs, Stablemen, & Helpers of America (see American Federation of Labor)			
International Federation of Business & Professional Women	Civic		30
International Petroleum Exposition	Business		30
International Police Chiefs Association	Civic		30
Jewish Education Association	Religious		30
Jewish Forum	Charitable		26
Johnson County Missouri Republican Committee	Political		29
Kansas City Philharmonic	Cultural	1	00
Kansas Day Republican Club	Political		30
Keep American Out of War Congress	Political		45
Kiwanis International	Civic		30
Knights of Columbus	Religious		30
Laymen's Crusade for Christian Education of the International Council of Religious Education	Religious		15
Library of Congress	Governmental	14	45
Lord & Taylor	Business		30
Los Angeles Philharmonic	Cultural	1	22
Man and the World (see Museum of Science & Industry, in Chicago)			
Maritime Day (see National Maritime League)			

Organization	Classification	Total Time Hr.	Min.
ary Miller Vocational High School	Cultural		30
edical Society of the State of N. Y.	Scientific		28
Medicine in the News" (see American Medical Association)			
erchants Association of N. Y.	Business		15
essage of Israel (see United Jewish Laymen's Committee)			
etropolitan Junior Achievement Inc.	Civic		15
etropolitan Opera Association	Cultural	52	57
etropolitan Opera Guild	Cultural	1	15
idwestern Music Camp	Cultural		30
ilitary Order of World War	Patriotic		30
ilitary Training Camp Association	Patriotic		15
inute Men of America	Patriotic		15
obilization for Human Needs (see Community Chest Councils)			
ontreal Symphony	Cultural	2	57
other's Day (see Golden Rule Foundation)			
useum of Modern Art	Cultural	2	30
useum of Science & Industry in Chicago	Scientific	2	30
usical Adventures	Cultural		15
usic Educators National Conference	Cultural	15	30
ational Advertised Brands (see Drug Topics)			
ational Advisory Committee on Women's Participation at World's Fair	Civic		15
ational Art Society	Cultural	8	30
ational Association of Automobile Dealers	Business	1	00
ational Association for the Advancement of Colored People	Civic		26
ational Association of Broadcasters	Business		45
ational Association of Cost Accountants	Business		18
ational Association of Manufacturers	Business	5	17
ational Association of Mutual Savings Banks	Business		15
ational Association of Purchasing Agents	Business		30
ational Association of Real Estate Boards	Business		15
ational Association of Retail Druggists	Business		13
ational Association of Retail Grocers	Business		15
ational Association of Teachers of Speech	Educational		25
ational Automobile Association	Business		25
ational Board of Fire Underwriters	Business		29
ational Catholic Welfare Conference	Charitable		25
ational Committee on Cause & Cure of War	Political		30
ational Committee for Music Appreciation	Civic		30
ational Conference of Christians & Jews	Religious		37
ational Council of Catholic Charities	Charitable	1	00
ational Council of Catholic Men	Religious	26	30
ational Council of Catholic Women	Religious	4	15
ational Council of Jewish Women	Religious		15
ational Council of Teachers of English	Educational		15
ational Council of Teachers of Speech	Educational		15
ational Council of Women of U. S., Inc.	Civic	2	45
ational Defense Commission	Governmental		57
ational Democratic Clubs	Political		30
ational Educational Association of the U. S.	Educational	1	30
ational Farm & Home Hour (see Dept. of Agriculture)			
ational Federation of Music Clubs	Cultural	3	00
ational Federation of Stamp Clubs	Educational	13	00
ational First Aid Week (see National Association Retail Druggists)			

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Organization	Classification	Total Time Hr.	Min
National Foundation for American Youth	Political		15
National Foundation of Infantile Paralysis	Charitable	5	59
National Geographic Society	Scientific		27
National Hotel Association	Business		23
National Interfraternity Council	Educational		23
National Labor Relations Board	Governmental		15
National League of Women Voters	Political		15
National Maritime League	Business	1	00
National Metal Congress Exposition	Business		15
National Music Week Committee	Cultural	1	45
National Music Camp	Cultural	10	00
National Negro Congress	Civic		44
National Petroleum Association	Business		30
National Philharmonic Symphony	Cultural	1	00
National Press Club	Business		39
National Public Housing Conference, Inc.	Civic		29
National Radio Demonstration Debate (see National University Extension Association)			
National Radio Forum (see Washington Evening Star)			
National Republican Club	Political	5	00
National Resources Planning Board	Governmental	5	00
National Security League	Patriotic & Political		44
National Society of New England Women	Patriotic		15
National Sojourners	Patriotic		30
National Symphony Orchestra	Cultural	1	30
National Tuberculosis Association	Charitable		15
National University Extension Association	Educational	1	00
National Urban League	Civic		15
National Vespers (see Federal Council of Churches of Christ in America)			
National Youth Administration (see N. Y. A Radio Workshop)	Governmental		30
New Friends of Music	Cultural	15	57
News Welfare Association	Charitable	2	27
Newspaper PM Inc.	Business		15
New York City Water Supply Control Department	Civic		30
New York Federation of Music Clubs	Cultural		15
New York Herald Tribune	Civic	9	02
New York Newspaper Women's Club	Business		15
New York State Conference on Social Work	Civic		13
New York State Federation of Labor	Labor		25
New York State Health Department	Civic		13
New York World's Fair	Business	28	06
Northern Baptist Church	Religious		30
Northern Ohio Opera Association	Cultural	1	00
Northwestern University	Scientific		30
Olivet College	Cultural		15
Oregon Republican Club	Political		30
Paderewski Fund for Polish Relief	Charitable		45
Palestine Conservatory of Music in Jerusalem	Charitable		44
Pan-American Union	Governmental	4	23
Parents Magazine	Educational		22
Parent Teachers Association	Educational		30
Pennsylvania Society	Political		26
Peoples Lobby, Inc.	Political	1	45
People's Mandate	Patriotic		15
Pharmacy Week (see American Pharmaceutical Association)			

[Vol. 3918]

Organization	Classification	Total Time Hr.	Min.
Phi Beta Kappa	Educational		15
Phi Mu Alpha Sinfonia Fraternity	Cultural		15
"Pilgrimage of Poetry" (see Library of Congress)			
P M, Inc. (see newspaper PM, Inc.)			
Police & Fire Dept. Toy Campaign	Charitable		10
Poor Richard Club	Civic		30
Port of New York Authority	Civic		15
Presbyterian General Assembly	Religious		09
President's Birthday Ball (see National Foundation for Infantile Paralysis)			
Progressive Education Association	Educational		30
Prohibition Party of the U. S.	Political		15
Propeller Club (see National Maritime League)			
Protestant Episcopal Church	Religious		30
Public Affairs Committee, Inc.	Educational	1	30
Radio Pulpit (see Federal Council of Churches of Christ in America)			
Radio Workshop (see Mary Miller Vocational High School)			
Raising a President (see Dept. of Labor)			
Red Cross (see American Red Cross)			
Religion in the News (see Federal Council of Churches of Christ in America)			
Republican Club of Massachusetts	Political		30
Republican Mass Meeting (Nebraska)	Political	1	20
Republican National Committee	Political	47	11
Republican State Committee	Political	1	17
Reserve Officers Association	Patriotic		12
Rochester Civic Orchestra	Cultural	19	00
Rochester Philharmonic	Cultural	6	00
Rotary International	Civic		30
Salvation Army	Charitable	1	13
San Francisco Church Federation	Religious		30
San Francisco Fair	Business		53
San Francisco Opera Association	Cultural	2	51
San Francisco Symphony	Cultural	1	00
Scholastic Magazine	Cultural		30
Scholastic Press Association (see Columbia University)			
Science on the March (see American Association for the Advancement of Science)			
Sigma Alpha Epsilon Fraternity	Educational		14
Sixth Avenue Association	Business		15
Smith College Alumni Association	Educational		15
Socialist Party of the U. S.	Political	1	41
Society of the Friendly Sons of St. Patrick	Patriotic		30
Sons of the American Revolution	Patriotic		20
Southern Baptist Church	Religious		24
St. Louis Cooperative Employment Council	Civic		30
St. Louis Opera Association	Cultural		55
Stanford University	Scientific	4	00
State Charities Aid Association	Charitable		15
Sunday Vespers (see Federal Council of Churches of Christ in America)			
Synagogue Council of America	Religious	1	00
"This Our America" (see National Resources Planning Board)			

[Vol. 399] Organization	Classification	Total Time Hr.	Min.
Topeka Chamber of Commerce	Business		30
Toronto Promenade Symphony	Cultural	4	15
Town Hall, Inc	Educational	24	30
Townsend Plan Organization	Political		15
Traveler's Aid Society	Charitable		24
Twentieth Century Fund	Charitable	3	15
Tuskegee Institute	Educational		45
Union of American Hebrew Congregation	Religious	4	30
United Auto Workers (see Congress of Industrial Organizations)			
United Brotherhood of Carpenters & Joiners of America (see American Federation of Labor)			
United Hospital Fund of N. Y.	Charitable		27
United Jewish Laymen's Committee	Religious	26	00
United Lutheran Church	Religious		15
United Mine Workers (see Congress of Industrial Organizations)			
U. S. Army Recruiting Programs (see U. S. Military Academy)			
U. S. Chamber of Commerce	Business	1	46
U. S. Committee for the Care of European Children	Charitable		15
U. S. Conference of Mayors	Civic		30
U. S. Junior Chamber of Commerce	Business		59
U. S. Marine Corps	Governmental		30
U. S. Military Academy	Governmental	2	30
U. S. Office of Education	Governmental	38	45
U. S. Public Health Service	Governmental		15
U. S. Secret Service (see Dept. of Treasury)			
University & College Glee Clubs	Educational	8	00
University Broadcasting Council of University of Chicago (see Field Museum of Natural History of Chicago)			
University of California (see Stanford University)			
University of Chicago	Educational	26	00
University of Cincinnati, Oratorio Society	Educational	1	00
University of Pennsylvania	Educational	1	07
University of Rochester	Educational	1	09
University of Virginia	Educational		48
University of Wisconsin	Educational	1	00
Unlimited Horizons (see Stanford University)			
Vassar College	Educational		20
Vermont State Republican Club	Political		29
Veterans of Foreign Wars	Patriotic	3	34
Veteran Wireless Operators Association	Scientific		15
Vocational Guidance Association (see American Association for Adult Education)			
Vocational Service for Juniors	Civic & Educational		45
Washington Evening Star	Political	15	30
Washington State Republican Club	Political		29
Westminster College	Cultural		30
White House Conference on Children in a Democracy	Charitable	1	26
Winston-Salem, N. C., Chamber of Commerce	Business		30
Women's National Republican Club	Political		59
Women's Symphony Orchestra	Cultural	1	30
Woodmen of the World Life Insurance Society	Business		30
Worker's Education Bureau of America	Labor		15
World Is Yours (see U. S. Office of Education)			
World Peaceways, Inc	Political		15
Young Democratic Clubs	Political		46

[fol. 400] Organization	Classification	Total Time Hr. Min.
Young Men's Christian Association	Civic	45
Young People's League of the United Synagogue of America	Religious	30
Young Republican Club of North Carolina	Political	29
Young Republican League of Iowa	Political	25
Young Women's Christian Association	Civic	13
Youth Builders', Inc.	Civic	22
Youth Committee Against War (see Keep America Out of War Congress)		
Youth To-day Magazine	Educational	30

Organization time shown includes local broadcasts on WEAF and WJZ.

EXHIBIT "E" TO AFFIDAVIT

Outstanding Public Service Programs

NBC Red & Blue Networks

1941

NBC Symphony Tuesday Blue 9:30-10:30 PM

Symphonic music conducted by outstanding conductors. Currently—Leopold Stokowski. Last year—Arturo Toscanini.

November 13th, 1937—to date.

National Farm and Home Hour
Mon-Fri Blue 12:30-1:00 PM
Saturday Blue 12:30-1:30 PM

News, music and information of special interest to farmers and homemakers. Cooperation U. S. Department of Agriculture.

July 8, 1929—to date.

Music Appreciation Hour Friday Blue 2:00-3:00 PM

A series of music appreciation programs dedicated to schools and colleges of the United States; conducted by Dr. Walter Damrosch. Programs graded to suit mentality of pupils of both primary and higher grades.

October 26th, 1928—to date.

America's Town Meeting of the Air
Thur Blue 9:15-10:00 PM

Series of forum programs broadcast from floor of Town Hall presenting leaders of various fields of thought in

[fol. 414] of August 1, 1941. This cancellation is pursuant to the terms of our contract which is subject to any rules and regulations of the Commission and is required as a result of the regulations recently adopted by the Commission.

In the event that the effective date of these regulations should be postponed beyond August 1, 1941, the effective date of this cancellation shall be postponed for the same period.

It is our desire to negotiate a revised contract which will conform with the regulations as adopted as soon as is practicable.

Sincerely yours, (Signed) B. Bryan Musselman,
Vice-President.

BBM:om.

EXHIBIT 11

Copy

KYUM, Yuma, Arizona

June 24th, 1941.

National Broadcasting Company, Inc.,
R. C. A. Building, Radio City,
New York City, N. Y.

Re: Radio Station KYUM contract

GENTLEMEN:

At a special meeting of the Board of Directors of the Yuma Broadcasting Company, held on June 19th, 1941, the following Resolution was adopted:

"Whereas, the Federal Communications Commission on May 2nd, 1941, issued an Order in Docket No. 5060, containing Regulations 3.101, 3.102, 3.103, 3.104, 3.105, 3.106, 3.107 and 3.108, and,

"Whereas, such Order and Regulations make necessary some changes in the outstanding contracts of the Yuma Broadcasting Company,

"Therefore, Be It Resolved, that the Board of Directors of the Yuma Broadcasting Company instruct its man-

[fol. 401] American political, economic life in discussion of current problems.
May 30th, 1935—to date.

University of Chicago Round Table Sun Red 2:30-3:00 PM

Discussion of the current topics of political, economic and social interest by members of University of Chicago faculty and prominent leaders in above field of interest.
February 1st, 1931—to date.

Rochester Civic Orchestras Fri Blue 10:00-10:30 PM
Program of classical music.
November 29th, 1929.

Great Plays Sun Blue 3:00-4:00 PM

Dramatic program showing the development of the drama from the Greek to the present day; featuring outstanding artists from the stage and radio.
February 26th, 1938—to date.

Hemisphere Revue Wed Blue 9:00-9:30 PM

Variety program built to show the talent of all the Americas, and to cement our feeling of good will; featuring stars from the radio and stage and guest speakers from the South American countries.
May 14th, 1941—to date.

For America We Sing Mon Blue 9:30-10:00 PM

Musical series under the auspices of the Treasury Department in the interest of Defense Stamps and Bonds—featuring stars from the operatic and concert stage.
July 22, 1941—to date.

Radio City Music Hall Sunday Blue 12:30-1:30 PM

Program of classical music, operatic renditions of chamber music recitals; conducted by Erno Rapee.
January 14th, 1934—to date.

Good Neighbors Thursday Red 10:30-11:00 PM

Series presented by NBC to help the people of North America to become better acquainted with our neighbors

[fol. 402] in South America; twenty-two dramatized human interest programs built around the twenty Central and South American republics.

May 22nd, 1941—October 16th, 1941.

America Looks Abroad Sunday Blue 12:00-12:15 PM

Series of programs of non-partisan discussion of current issues by members of Foreign Policy Association under whose auspices the series are run.

October 29th, 1939—to date.

I'm an American Sunday Blue 12:15-12:30 PM

Series of talks by naturalized American citizens telling why they wanted to become an American citizen; outstanding personalities have been interviewed. Produced in cooperation with the U. S. Department of Justice.

May 4th, 1940—to date.

National Radio Forum Monday Blue 9:00-9:30 PM

Discussions of current issues by leading governmental figures—in cooperation with the Washington Star.

January 18th, 1932—to date.

World Is Yours Sunday Red 1:30-2:30 PM

Series of weekly dramatizations of exhibits in Smithsonian Institution in cooperation with Smithsonian Institution and U. S. Office of Education.

June 7th, 1936—to date.

New Friends of Music Sunday Blue 6:05-6:30 PM

Chamber music societies featured from Town Hall stage—Budapest String Quartet and Primrose String Quartet examples of music featured.

January 23rd, 1938—to date.

Between the Bookends
Mon thru Fri Blue 1:15-1:30 PM

Poetry by Ted Malone.

Sept 5, 1938.

[fol. 403] Behind the Mike Sunday Blue 4:30-5:00 PM

Program presenting stories behind programs, personalities and every phase of radio from the entertainment standpoint.

September 15, 1940—to date.

Listen America Sunday Red 3:30-4:00 PM

Dramatizations of the stirring and significant story of America's mighty new quest for health in cooperation with the Women's National Emergency Committee and outstanding speakers in government and public life.

June 13th, 1941—to date.

Story Behind the Headlines
Sunday Red 11:15-11:30 PM

Cesar Saerchinger, noted foreign correspondent, discussing news events of the week, with sketch of historical background leading up to it. Program in cooperation with American Historical Association.

March 4th, 1938—to date.

Spin and Win With Jimmy Flynn
Saturday Blue 9:00-9:30 PM

Quiz type of audience participation program presented in a circus or carnival atmosphere with Master of Ceremonies, Jimmy Flynn, questioning participants from army bases throughout the country in a "barker" style.

November 20th, 1940—to date.

Wake Up America Sunday Blue 2:00-3:00 PM

Hour long radio forum, produced by NBC in cooperation with the American Economic Foundation; devoted to discussions of currently important economic issues by noted speakers. Both sides of the issue are presented.

September 28th, 1941—to date.

Speaking of Liberty Thursday Red 6:30-6:45 PM

Series of programs under auspices of the Council for Democracy. Rex Stout as M. C., brings to the microphone each week authors, journalists, etc. of note, whose work has led them to explore fields of "thinking about democracy".

April 17th, 1941—to date.

[fol. 404] Story Dramas by Olmstead
Monday, Wednesday, Friday Red 11:15-11:30 PM

Dramatized versions of the world's greatest ghost stories, as collected and told by Nelson Olmstead.
September 30th, 1940—to date.

Raising a President Monday Blue 11:30-11:45 AM

Program directed toward mothers, regarding the care and guidance of their children, presented in cooperation with the Children's Bureau, U. S. Department of Labor. In a "Court of the Air" type of presentation, problem letters of parents are dramatized and then discussed by a panel composed of one parent and two child guidance experts.
October 2nd, 1940—to date.

What Can I Do Thursday Blue 11:45-12:00 Noon

Program answering the question of American women who want to do their part in defense. Sylvia Porter, finance editor gives economic side of picture. Defense news of week as it concerns women is given. June Hynd interviews a woman who has an active place in the defense picture.
July 31st, 1941—to date.

Alma Kitchell's Streamline Journal
Tuesday Blue 11:30-12:00 Noon

A program where one of radio's most popular artists meets her friends in an intimate period of visiting in which she tells new facts about broadcasting and the people engaged in it; brings visitors to the microphone.
December 4th, 1939—to date.

Travelling Cook Thursday Blue 11:00-11:15 AM
Friday " " " "

Richard Kent, bringing romance to the kitchen in a series of brodacasts featuring fool-proof recipes from every corner of the globe.
November 14th, 1939—to date.

Defense for America Saturday Red 7:00-7:30 PM

Series of programs in cooperation with the National Association of Manufacturers dealing with American industry

actually at work on National Defense projects. Industry's [fol. 405] weekly report to the nation on the progress of national defense production.

February 22nd, 1941—October 25th, 1941.

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRANK E. MULLEN, VICE-PRESIDENT AND GENERAL MANAGER OF NATIONAL BROADCASTING COMPANY, INC.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

Frank E. Mullen, being duly sworn, deposes and says:

I am Vice-President and General Manager of National Broadcasting Company, Inc. (hereinafter called "NBC"), one of the plaintiffs herein. This affidavit is made in opposition to defendants' motions to dismiss the complaint or, in the alternative, for summary judgment.

The effect of the issuance by the Federal Communications Commission of its Order relating to chain broadcasting on May 2, 1941, in Docket No. 5060 (Exhibit D to the verified complaint herein), has been forcibly called to my attention by the large number of letters received from independently operated affiliates of NBC, cancelling their respective affiliation contracts with NBC or refusing to abide by the terms of existing affiliation contracts.

As stated in the affidavit submitted by Niles Trammell, President of NBC, in support of plaintiffs' motion for a preliminary injunction, between May 2, 1941, and October 30, 1941, not less than 48 affiliated stations having effective contracts of affiliation with NBC containing one or more provisions of the types described in the Commission's Order, served notice upon NBC of cancellation of said contracts or of refusal to abide by the existing terms thereof.

Copies of 15 representative letters are hereto annexed and marked Exhibits 1 to 15, inclusive.

Unless a preliminary injunction is granted in this action, substantially all of NBC's affiliated stations will take similar [fol. 406] action to cancel their existing affiliation contracts or to refuse to abide by their terms.

Frank E. Mullen.

Subscribed and sworn to before me this 3rd day of January, 1942. Florence E. Marger, Notary Public. Queens Co. No. 2625, Reg. No. 6868. Cert. filed in N. Y. Co. No. 573, Reg. No. 3-M-369. Commission Expires March 30, 1943. (Seal.)

Exhibits to Affidavit of Frank E. Mullen

EXHIBIT 1

Copy

(WPTF Letterhead)

Raleigh, N. C.—June 4, 1941.

Mr. William S. Hedges, Vice President, National Broadcasting Company, Inc., New York, N. Y.

DEAR MR. HEDGES:

You may regard this letter as our formal notice of cancellation of affiliation contract between the National Broadcasting Company and the WPTF Radio Company, dated April 15, 1939, said cancellation to become effective August 2, 1941. We are exercising this cancellation privilege as provided in paragraph fifteen of the contract aforementioned, inasmuch as said contract is in conflict with Federal Communications Commission regulations 3.101, 3.102, 3.103, 3.104, 3.106, 3.107, and 3.108 (Commission Order in Docket No. 5060, May 2, 1941).

The above cancellation notice applies likewise to the agreements set forth in your letters of December 30, 1940, and January 8, 1940, which were written as supplements to the affiliation contract dated April 15, 1939.

While we are issuing this formal cancellation notice in regard to the contract above mentioned, we shall be glad to enter into negotiations with the National Broadcasting Company with the view toward executing another affiliation

contract which will comply in all respects with and be sub-
[fol. 407] ject to all rules and regulations now in effect or hereinafter promulgated by the Federal Communications Commission.

Sincerely yours, (Signed) J. R. Weatherspoon.

EXHIBIT 2

Copy

WHKY

Hickory, North Carolina,
May 17, 1941.

The National Broadcasting Company, R. C. A. Bldg., Radio City, New York, N. Y.

Attn: Mr. Phil Merryman

DEAR MR. MERRYMAN:

I have just received a copy of The Rules and Regulations promulgated by the Commission pursuant to the Report on Chain Broadcasting.

Upon examination of Rules 3.101 to 3.108 inclusive, it clearly appears that our present contract with you will be illegal after July 31, 1941. Unless this effective date of the Rules and Regulations is extended, in one manner or another by appropriate authority, it is our desire to consummate a new arrangement with you on or before that date. Undoubtedly you have given considerable study to this matter and we would appreciate receiving any suggestions as to an appropriate form of contract.

It appears also that our license would be in jeopardy should we continue our affiliation with you after the effective date of the above-mentioned Rules, unless you have divested yourself of one of the two networks which you now own. Before we could legally enter into any new arrangement with you, therefore, it would be necessary that we receive your warranty that the Rules and Regulations of the Commission have been satisfied in this respect.

It is our desire to continue our affiliation with your network but naturally we can not do so at the expense of our license.

[fol. 408] We would appreciate your early advice in regard to this matter.

Yours very truly, Catawba Valley Broadcasting Co., Inc. (Signed) W. T. Hix, Manager.

h.

EXHIBIT 3

True Copy

WJDX

Jackson, Miss.

July 3, 1941:

National Broadcasting Company, New York, N. Y.

Attention Mr. William Hedges

DEAR BILL:

At the suggestion of our legal representatives we are writing in reference to our network affiliation agreement dated March 15, 1935, together with supplement of November 4, 1940, an addition thereto, between The Lamar Life Insurance Company and the National Broadcasting Company for the use of the facilities of Broadcast Station WJDX, located at Jackson, Mississippi. We are assuming that this agreement will be continued and carried out on such a basis and in such a way as will fully comply with the chain broadcasting regulations promulgated by the Federal Communications Commission (F. C. C. Rules 3.101 to 3.108 inclusive) which, unless otherwise ordered, are to become effective on and after August 2, 1941.

If the effective date of the rules above referred to should be postponed, or if the rules mentioned should be amended or modified, then we assume that both you and we are to and will construe the agreement above mentioned in such a way as to comply with said rules.

So that our records may be complete in this connection, please acknowledge receipt of this communication at your earliest possible opportunity.

[fol. 409] Needless to say, I hope the rule will never be put into effect, but that we may conform to the legal requirements please see that this is given the necessary attention.

Cordially and sincerely yours, (Signed) Wiley Harris, W. P. Harris, Director Lamar Life Station WJDX.

WPH:S.

EXHIBIT 4

Copy

Phoenix Republic and Gazette

June 23, 1941.

Mr. Niles Trammell, President, National Broadcasting Company, RCA Building, 30 Rockefeller Plaza, New York City, N. Y.

DEAR NILES:

You more than anyone else, I believe, have a present appreciation of how time is moving on at a terrifically fast rate.

August 2 will be here before we will realize it and unless there is a change in the effective date of the Commission's recent regulations 3.101 to 3.108, it will have been essential that there shall have been established a new relationship between KTAR and KVOA and the National Broadcasting Company. Such a relationship will of course have to give effectiveness to the new rules and unless such is established, or unless the order is rescinded, or the effective date delayed, it is apparent that it will be necessary for us to cancel the effectiveness of the present contract.

At Yuma's request their letter has been sent to you and Safford has been talking over the telephone with us for a number of days.

We have explained to them that it is not to be doubted that you will be sending along that which will be representative of the kind of a relationship you will hope to establish in lieu of that which will have been outlawed, if that comes to pass.

This letter has as its purpose to ask you to give us your proposal as an acceptable substitute for present contracts [fol. 410] for KTAR and KVOA, as well, as, we would presume, Safford and Yuma.

Sincerely yours, W. W. Knorpp.

W. W. Knorpp-n.

EXHIBIT 5

Copy

WEBC, Duluth, Minn.

June 11th, 1941.

Mr. William S. Hedges,
National Broadcasting Company, Inc.,
New York, N. Y.

GENTLEMEN:

We are faced with the necessity of complying with the recently adopted rules of the Communications Commission relating to stations engaged in chain broadcasting and accordingly give you notice herewith of cancellation of our affiliation agreement with your company effective as of August 1, 1941, when we understand the new rules are effective. Should this effective date be postponed by action of the Commission, or otherwise, the effective date of this cancellation is similarly deferred.

We believe that programs which you sponsor and make available to us are of great value to us in enabling our station to operate in the public interest. For this reason, we would like the opportunity of considering a new form of agreement with you, conforming to present rules and regulations of the Federal Communications Commission, which will enable us to continue to broadcast your programs.

Very truly yours, Central Broadcasting Company.
By W. C. Bridges (Signed).

[fol. 411] EXHIBIT 6

Copy

KPRC, The Houston Post

July 16, 1941.

Mr. Niles Trammell, President,
National Broadcasting Company,
New York City, N. Y.

DEAR MR. TRAMMELL:

With reference to the affiliation contract of Radio Station KPRC with the National Broadcasting Company, I note that the orders of the Commission, adopted on May 2, 1941, relating to these contracts, become effective on August 2, 1941.

I, therefore, wish to inform you that on and after the effective date of these orders, on behalf of Radio Station KPRC, we will consider all parts of this affiliation agreement which are in conflict with the above orders as repealed and nullified by these orders.

Very truly yours, (Signed) W. P. Hobby, President,
Houston Printing Corporation.

WPH/lc.

EXHIBIT 7

Copy

Flint Broadcasting Company
Flint, Mich.

May 27, 1941.

National Broadcasting Company
RCA Building
New York, N. Y.

Attn: Mr. William S. Hedges

GENTLEMEN:

Please be advised of our intention to cancel our contract with the National Broadcasting Company and the King-

Trendle Broadcasting Corporation dated August 31, 1938, [fol. 412] cancellation to be effective as of the close of business July 31, 1941; and cancellation to take effect unless there should be a postponement of the regulations of the Federal Communications Commission issued May 2, 1941.

Kind regards.

Sincerely yours, (signed) Howard M. Loeb, Managing Director, Flint Broadcasting Company.

HMLoeb.
RD.
cc: King-Trendle Broadcasting Corp.

EXHIBIT 8

True Copy

The Kansas City Star

July 3, 1941.

National Broadcasting Company, Inc.
Radio City, Rockefeller Plaza
New York, New York

GENTLEMEN:

You are hereby notified that the undersigned cancels and terminates the agreement heretofore existing between you and the undersigned, dated September 22, 1936, such termination and cancellation to be effective as of July 31, 1941.

It is the desire of the undersigned, as the operator of station WDAF, to make programs broadcast by your network available to its listeners under arrangements conformable to the Federal Communications Act and lawful regulations of the Federal Communications Commission. We desire to enter into negotiations with your company for a new contract, and suggest that a conference be arranged for discussion of terms in the near future.

Yours very truly, The Kansas City Star Company.
By (Signed) Earl McCollum, Vice President,
Owner and Operator of Radio Station WDAF.

[fol. 413] EXHIBIT 9

True Copy

City of St. Petersburg, Florida

July 16, 1941.

National Broadcasting Company
R. C. A. Building
New York City

Attention: Mr. William H. Hedges, Vice President

DEAR MR. HEDGES:

Please take notice that pursuant to the Commission's order in Docket 5060 in the matter of the investigation of chain broadcasting promulgated on May 2, 1941, we are hereby canceling the agreement between the City of St. Petersburg and your Company, dated November 26, 1940, the cancelation to become effective on August 2, or on such other date as the Commission might designate as the effective date of its order.

It is the desire of the City of St. Petersburg to continue its affiliation with the National Broadcasting Company and we are now prepared and are willing to enter into a new agreement which will be consistent with the Commission's regulations.

Yours very truly, (Signed) G. V. Leland, City Manager.

EXHIBIT 10

Copy

Lehigh Valley Broadcasting Co.

Allentown, Pennsylvania

May 26, 1941.

National Broadcasting Company
30 Rockefeller Plaza
New York, N. Y.

GENTLEMEN:

This is formal notice of our desire to cancel our affiliation contract with the National Broadcasting Company as

agement to effectuate a new contract, which will meet the terms of the Order, with any concern with whom this corporation now has a present contract, to take the place [fol. 415] of such existing contract, in the event that the said Order and Regulations are not modified or revised, or their effective date postponed, and, in the event that a new contract, which will permit radio station KYUM operated by this company to operate strictly in accordance with the Orders and Regulations of the Commission, cannot be effectuated that then all necessary steps be taken to terminate any contract in conflict with such Orders and Regulations."

Our contract with you, as you know, consists of the offer contained in your letter of February 8th, 1940, and our acceptance thereof indorsed thereon.

Since the making of the Order by the Commission we have studied the contract with a view of determining, if we could, what changes would have to be made therein to conform with the regulations of the Commission now in effect, and which, of course, must be complied with. We have come to the conclusion that the necessary changes or modifications are so great that it is useless for us to make any suggestions until we know what your Company intends to do, since, as we understand the Regulations, this Station will not be permitted thereunder to continue the acceptance of network services from you, to do so being in violation of Sections 3.106 and 3.107, relating to the ownership by network companies of two networks and of two stations covering the same market.

We have appreciated very much the network services furnished us by you, and would like to continue network services from you if a contract can be worked out, which is not in conflict with the regulations. In the event that such a contract cannot be worked out, and, in the further event that the Order and Regulations of the Commission are not modified, or revised, or more time not given in which to determine whether a contract can be drawn that is acceptable under the Commission's regulations, it will be necessary for us to discontinue your network services at the end of the prescribed 90 day period.

Under the circumstances, we would appreciate it very much if you would submit for our consideration and acceptance such modified or revised contract as your company

believes will meet the requirements of the Regulations of the Commission. We make this request as we are not in [fol. 416] position to know what your company plans to do, or what network services you will be in position to offer.

Yours very truly, Yuma Broadcasting Company, By (Signed) John H. Huber, President.

RNC/Mc.

EXHIBIT 12

Copy

Memphis Publishing Company

Memphis, Tennessee

June 16, 1941.

National Broadcasting Co.
RCA Building Radio City
New York City

GENTLEMEN:

In view of the provisions of Section 3.107, 3.108 and other pertinent regulations of the Federal Communications Commission published May 2, 1941; we are under the necessity of advising you of our intention to discontinue the affiliation contract of WMC with your company, effective at the close of business July 31, 1941, unless:

"The effective date of the Commission's regulations is postponed," or

"Your company places itself in a position where we are free to negotiate a contractual affiliation conformable to the regulations."

Very truly yours, Memphis Publishing Company, Enoch Brown, Jr., Vice President & General Manager.

[fol. 417]

EXHIBIT 13

Copy

KSOO
KELO

Sioux Falls, S. D.

June 20, 1941.

Mr. William S. Hedges
Vice-President in Charge of Stations
National Broadcasting Company
RCA Building Radio City
New York City

DEAR BILL:

In accordance with the new Rules and Regulations of the Federal Communications Commission concerning the chain affiliations of station licenses, we are writing you regarding the KSOO and KELO affiliation contracts with the National Broadcasting Company.

As you know, KSOO is at present affiliated with the National Broadcasting Company as a member of the basic supplementary Red and Blue Networks. KELO is likewise at present a member of the basic supplementary Red and Blue Networks, taking network service after KSOO is no longer available.

Under the new Rules and Regulations of the Federal Communications Commission, we are notifying you that we are cancelling our present affiliation contracts for KSOO and KELO with the National Broadcasting Company. Our cancellation will take effect as of the close of business July 31, 1941. We will be glad to enter into a new affiliation agreement with you subject to the new Rules and Regulations of the Federal Communications Commission with respect to network operations, and we will look forward to a resumption of relations in compliance with these new Rules and Regulations.

Kind regards.

Sincerely yours Sioux Falls Broadcast Ass'n Inc.,
Joseph Henkin, President.

JH:S.

[fol. 418] EXHIBIT 14

True Copy

WBAL

Baltimore, Md.

July 3, 1941.

National Broadcasting Company, Inc.
RCA Building, Radio City
New York, New York

GENTLEMEN:

The WBAL Broadcasting Company (Radio Station WBAL) now has a contract with the National Broadcasting Company, dated October 29, 1936, for the broadcasting of NBC programs. The WBAL Broadcasting Company also has a contract with the National Broadcasting Company dated November 26, 1940, as modified on December 5, 1940 and February 14, 1941, which goes into effect on October 1, 1941, under the terms of which WBAL will broadcast programs of the red network.

Both of these contracts contain provisions which appear to be in conflict with the rules and regulations promulgated by the Commission as a result of the network investigation. We are advised that it will be necessary to modify both of these contracts by August 1, 1941, unless the effective date of these new regulations is postponed by the Commission.

This is to advise you that we stand ready to perform our contracts with your company in so far as the terms of these contracts are not in conflict with the Commission's rules and regulations.

Very sincerely yours, WBAL Broadcasting Company, by (Signed) H. C. Burke, President.

[fol. 419]. EXHIBIT 15

Copy

KGW KEX

Portland, Oregon

June 5, 1941.

Mr. William S. Hedges
National Broadcasting Co., Inc.
RCA Building
New York, New York

DEAR MR. HEDGES:

From a consideration of the recent regulations of the Federal Communications Commission with reference to network affiliation agreements, we are apparently faced with the necessity of amending the existing affiliation agreements with your company affecting the operation of our Stations KGW and KEX.

The effect of these regulations indicates that existing licenses of broadcasting facilities must present satisfactory evidence to the Commission concerning the contractual relations insofar as the same apply to network operations, and in this connection we would now invite a statement from your company indicative of its desires and intentions with respect to the changes in our existing contracts that may be necessary to meet the Commission requirements.

We are, of course, willing and desirous of continuing to release the network programs originating from and furnished by your company, and at the same time must comply with the Commission's regulations with respect to such network affiliations.

Would be pleased to have an expression of your views and comments on the procedure to be followed.

Yours very truly Arden X. Pangborn, Managing Director.

axp lp

[fol. 420] IN UNITED STATES DISTRICT COURT

AFFIDAVT OF PHILIP J. HENNESSEY, JR.

DISTRICT OF COLUMBIA,
Washington, ss:

Philip J. Hennessey, Jr., being duly sworn says:

I am a lawyer engaged in practice at Washington, D. C. Since 1938 I have been of counsel for National Broadcasting Company, Inc., in the proceedings designated Docket 5060 before the Federal Communications Commission under the Commission's Order No. 37. I am familiar with the scope of the Commission's public hearing, the requests for additional information directed to National Broadcasting Company by the Commission after the close of the public hearing, the Report of the Committee dated June 12, 1940, the briefs filed by NBC and others on or about November 12, 1940, the Oral Argument before the Commission on December 2 and 3, 1940, the Supplementary briefs filed with the Commission on January 2, 1941, the Commission's Order of May 2, 1941, and the amendments made to this Order thereafter.

The purpose of this affidavit is to demonstrate:

(a) That the proceedings before the Commission in Docket 5060 were legislative in character rather than judicial and

(b) That the public record of the proceeding in Docket 5060 does not contain any evidence of the economic effect of the Regulations promulgated by the Commission on May 2, 1941, as amended thereafter.

FCC Order No. 37 was issued on March 18, 1938. After reciting that

"The Commission has not at this time sufficient information in fact upon which to base Regulations regarding contractual relationships between chain companies and network stations, multiple ownership of radio broadcast stations of various classes, competitive practices of all classes of stations, networks and chain companies, and other methods by which competition may be restrained or by which restricted use of facilities may result;"

[fol. 421] The Commission ordered:

"An immediate investigation to determine what special Regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity; such investigation to include an inquiry into the following specific matters, as well as all other pertinent and related matters including those covered in the Report on Social and Economic Data prepared by the Engineering Department of the FCC and filed with the Commission on January 20, 1938."

The "Report on Social and Economic Data on Broadcasting" referred to in Order No. 37 is a volume of 197 pages (printed by the United States Government Printing Office in 1938) after an informal engineering conference which had been held beginning October 5, 1936. The subjects for discussion at this conference were:

1. Classification of broadcast stations.

2. Allocation of frequencies to different classes of stations.

3. Standards to be applied in determining coverage, and the presence or absence of objectionable interference.

4. Geographic distribution of broadcast facilities.

5. Standards and methods of measurements with respect to essential engineering phases of operation of broadcast stations.

6. Apparatus performance requirements to be imposed on broadcast stations.

7. Social and economic effect of any proposals regarding the foregoing subjects.

The nature and scope of the 1936 hearing and the Report which followed it may be guaged from the following paragraphs which appear on page 1 of the introduction:

"In order not to burden the main Report with the detailed discussions of the testimony recorded in the October hearing, and to give some relief to the burden of studying the voluminous record of more than half a million words, exclusive of the vast data contained in the exhibits attached to the record, the Department has made a brief summary of

[fol. 422] the testimony of each witness. This is attached hereto as Appendix C. In briefing summaries such as this, it is difficult to bring out all the points and therefore, final reliance may be had from the record itself.

"In constructing this Report we have utilized data taken from the records of the commission in addition to the testimony at the hearing, and in drawing conclusions we have relied to some extent on our practical experience in broadcasting."

Order No. 37 itself recited 13 subjects upon which the Commission desired information as follows:

1. The contractual rights and obligations of stations engaged in chain broadcasting, arising out of their network agreements.

2. The extent of the control of programs, advertising contracts and other matters exercised in practice by stations engaged in chain broadcasting.

3. The nature and extent of network program duplication by stations serving the same area.

4. Contract provisions in network agreements providing for exclusive affiliation with a single network and also provisions restricting networks from affiliation with other stations in a given area.

5. The extent to which single chains or networks have exclusive coverage in any service area.

6. Program policies adopted by the various national and other networks and chains, with respect to character of programs, diversification, and accommodation of program characteristics to the requirements of the area to be served.

7. The number and location of stations licensed to or affiliated with each of the various national and other networks. The number of hours and the specified time which such networks control over the station affiliates and the number of hours and the specified time actually used by such networks.

8. The rights and obligations of stations engaged in chain broadcasting so far as advertisers having network contracts are concerned.

[fol. 423] 9. The nature of service rendered by each station licensed to a chain or network organization, particu-

larly with respect to amount of program origination for network purposes by such stations.

10. Competitive practices of stations engaged in chain broadcasting as compared with such practices in the broadcasting industry generally.

11. Effect of chain broadcasting upon stations not affiliated with or licensed to any chain or network organization.

12. Practices or agreements in restraint of trade or furtherance of monopoly in connection with chain broadcasting.

13. Extent and effects of concentration of control of stations locally, regionally or nationally in the same or affiliated interests, by means of chain or network contracts or agreements, management contracts or agreements, common ownership or other means or devices, particularly in so far as the same tends toward or results in restraint of trade or monopoly.

Thereafter a supplementary notice was issued by the Commission on September 20, 1938 which set forth twenty subjects upon which the Commission desired information from NBC and others:

1. Corporate and financial history of network organization including detailed information on both direct and indirect ownership or control thereof;

2. Nature and character of activities engaged in by network from the date of its organization;

3. Name, number and location of all stations now or previously licensed to or affiliated in any manner with network with particular reference to the reasons for entering into or terminating any such affiliation and the basis upon which additional affiliations are entered into;

4. Nature of contracts, agreements or other arrangements between network and affiliates including reasons for various provisions of such contracts, agreements, or other arrangements, and history of the same;

[fol. 424] 5. Classification and grouping of stations connected with network as basic supplemental, etc., with reasons for same;

6. Financial arrangements between stations and affiliates, including basis for charges made by networks and affiliates;

7. The history and development of the network program policy, particularly with reference to standards which programs must meet, diversification, accommodation of program characteristics to the requirements of the area served, and program and advertising continuity;

8. Extent to which affiliates are required to conform to network program policy and extent to which affiliates control or influence policy;

9. History and development of operating policy and procedure with particular reference to contracts and agreements with wire companies for program transmission;

10. History and development of policy with respect to sale of time for advertising or other purposes, particularly with respect to standards applicable to products or services for which advertising is accepted;

11. Detailed information as to the hours which network controls over affiliated stations, the number of such hours actually used for network, commercial purposes over affiliated stations and the number of hours of network sustaining programs actually used by affiliates;

12. Rights of network and affiliates in event affiliate desires to substitute a local program for a network program.

13. History and development of agreements, contracts, or other arrangements between networks and advertisers, or other program sponsors, particularly and in detail agreements, contracts, or other arrangements with persons or organizations acting as agencies for the placing of broadcast advertising or the sale of time over the network.

14. History and development of policies with reference to the development of program talent and facilities or network organization devoted to that purpose;

15. Explanation and details of the organization, function, policies and practices of any agency directly or indirectly controlled by the network organization which retains and [fol. 425] procures talent for the purpose of selling such talent to the sponsors of commercial radio programs;

16. The nature of the service rendered by each station licensed to the network, particularly, with respect to the amount of program origination for network purposes at such stations and with respect to the nature of the local service rendered by such stations.

17. Name of any national advertising agency, user, or national representative of a station whose officers, directors, stockholders or proprietors hold any securities of the network organization, and the exact extent of such holdings;

18. Name of any national advertising agency, user, or national representative of a station, the securities of which are held by the network, its officers, directors, or proprietors;

19. Any relationship that may exist between the network and any national advertising agency, user, or national representative of a station through officers, directors, proprietors, employees, or security holders in common, and the exact nature and extent of such relationship;

20. Extent of program duplication in the primary and secondary service areas of stations carrying the network programs, particularly the percentage of population in the primary service area of each network station which may receive a network program as primary service from such station and from other network stations, the percentage of secondary service area of each network station which receives a network program as secondary service from such station and from other network stations, the number and extent of such duplications and amount of duplication required for adequate service areas shall be considered as defined in the Commission's proposed Rules and Regulations governing standard broadcast stations and Standards of Good Engineering Practices concerning the same.

On the same day, September 20, 1938, the Commission invited persons and organizations desiring to be heard to submit evidence through qualified and competent witnesses with respect to the matters covered by Order No. 37 and the 20 subjects set forth in the supplementary notice.
[fol. 426] Both the original Order and the supplementary notice related to conditions then existing or to the historical development of such conditions. Neither the Order nor the

supplementary notice called for any evidence of conditions prospectively.

From time to time statements were made during the public hearing in an effort to project into the future the operating experiences of the past but such statements were necessarily predicated upon the continuance of network broadcasting in a manner in which it was then and had theretofore been conducted.

At no time were such statements directed to any Rules or Regulations of the character promulgated by the Commission on May 2, 1941, nor could they have been because the earliest date upon which the Commission disclosed its intention to adopt specific Rules and Regulations was on November 28, 1940, about a year and a half after the public hearings were closed.

In opening the hearing on November 14, 1938 Chairman McNinch stated:

"In order to expedite the hearing as much as possible the networks, the transcription companies and those persons and organizations who have filed notices of appearances will be permitted to be represented by counsel in presenting direct testimony. *Cross-examination of witnesses generally will be by the Committee and by its staff.* Parties desiring to ask questions, should, if at all possible, hand the Commission's counsel such questions in writing. Departure from this procedure will be allowed only where the Committee shall decide that the ends of justice will be served thereby, upon request pointing out the interest of the party desiring cross-examination and the purpose and scope thereof. The Commission shall be furnished with fourteen copies of each exhibit offered in evidence.

* * * * * * *

"The purpose and object of this investigation is to develop facts for the information of the Commission and public concerning the matters included in Order No. 37. On the basis of the facts developed in the course of the investigation, *appropriate rules and regulations dealing with such matters will be promulgated by the Commission, and if such facts demonstrate the necessity therefor, legis-*
[fol. 427] *lative recommendations made to the Congress by the Commission.*

"The Committee will not permit this hearing to be used as a sounding board for any person or organization. We are after facts and intend to get them. Only relevant opinions of those qualified to speak may be admitted for whatever light they may throw upon the problems involved in this investigation. I have emphasized that paragraph in order that none may miss it or misunderstand its purport or the intention of the Committee, that this is a factual inquiry and it will be held to that, plus the expression of expert opinion that . . . relevant to matters at issue." (Emphasis added.)

The evidence submitted by NBC was responsive to all those items which the Commission had set forth in its original Order and in the supplementary notice of September 20, 1938. It covered in detail such matters as the organization of NBC departments, the types of programs produced, the mechanics of distributing programs to affiliated stations, listener preference among the various program types, the coverage of the affiliated stations, the development and uses of electrical transcriptions, the organization and functions of the NBC International Division, Talent, music, scripts, labor relationships, studios and studio construction, relationships between NBC and its advertising clients, income, expenses and balance sheets. The public record even contains a description of certain research done expressly for the hearing with respect to station coverage.

After the conclusion of the public hearing and in response to Commission requests of September 5 and September 25, 1939, certain additional financial and program information was submitted by NBC. After the Oral Argument on December 2 and 3, 1940 additional information was submitted pursuant to a request of December 20, 1940 concerning the organization of NBC departments. As late as April 11, 1941 the Commission requested additional information with respect to taxes to which NBC replied on April 14, 1941. None of these subjects were covered directly by the Regulations promulgated by the Commission, though all are influenced by such Regulations.

Although it is true, as asserted by Mr. Telford Taylor in his affidavit of November 5, 1941 that NBC testimony fills 3,225 pages of the transcript of the public hearing the [fol. 428] only NBC testimony which related directly to the subject matter of the Commission's Regulations—*i.e.* station contracts—was that of Mr. William S. Hedges.

Hedges' complete testimony occupies 262 pages. The bulk of it concerns operations rather than contracts and none of it supports the Regulations adopted by the Commission.

To the Report of the Committee which heard the evidence dated June 12, 1940 there was attached a "Digest and Analysis of evidence presented in the Hearing on Commission Order No. 37, (Docket 5060) *and of the Files of the Commission*". At page 2 of that Digest it is stated:

"The record in this hearing is composed of 8,713 pages of testimony and 674 exhibits; there were 94 witnesses heard and the hearing consumed 73 days, extending over a period of six months.

"*This report is based upon evidence from these sources and also from information otherwise in the records of the Commission.*" (Emphasis added.)

The earliest proposal for any specific rule was made by Mr. Louis G. Caldwell on behalf of Mutual Broadcasting System on April 19, 1939 and appears in Volume 70 of the transcript on pages 8454, *et seq.* This motion proposed merely an interlocutory regulation "worded somewhat as follows":

"No licensee of a standard broadcast station shall enter into a contract, agreement or other arrangement with any network organization covering or dealing with the affiliation of such licensee's station with the network organization or into any renewal or extension of their existing contract, agreement or other arrangement for a period extending beyond December 31, 1940."

This motion, which was repeated several times after the conclusion of the hearing, was not granted.

The report of the Committee, dated June 12, 1940, did not propose any regulations for adoption by the Commission.

No specific regulations had been proposed by the Commission when briefs were filed in November, 1940 upon the Committee Report.

Not until November 28, 1940, five days before the date set for oral argument, did the Commission indicate the type [fol. 429] of regulations which it was considering for adoption and in its notice dated November 28, 1940 the Commission said:

"It is to be understood that the regulations have not received the approval of the Commission, and are to be taken as suggestions by the Commission intended to focus the attention of counsel upon the issues raised in the report. It should also be understood that counsel are not in any way limited to a discussion of these regulations but may address themselves to any of the issues of fact or policy raised by the Report of the Chain Broadcasting Committee.".

On December 3, 1940, during the oral argument, Chairman Fly requested the parties to file supplementary briefs discussing the Commission's jurisdiction and the function of competition in broadcasting. These briefs were filed on January 2, 1941.

Between January 2, 1941 and May 2, 1941 there were no public proceedings. On May 2, 1941 the Commission formally promulgated Regulations 3.101 to 3.108, inclusive, which, as amended, are the subject of this action under Section 402 (a) of the Communications Act.

It thus clearly appears both from the terms of the original order itself, from the conduct of the proceedings thereafter, from the scope of the subject matter covered in the hearings, from the absence of any clearly defined issues and from the use of extra-record information by the Commission that the proceedings in Docket 5060 were legislative rather than judicial in character.

It also clearly appears that the evidence introduced at the public hearing in 1938 and 1939 could not have been directed toward establishing the effect upon network broadcasting of the regulations here in question since such regulations were not formulated, even in a preliminary form, until November 28, 1940 and were not promulgated in their present form until May 2, 1941. On the contrary, it clearly appears that the evidence introduced at the public hearing related to conditions as then existing in the industry.

Philip J. Hennessey, Jr.

Subscribed and sworn to before me this 10th day of December, 1941. Esther J. Jenkins, Notary Public, D. C. My Commission Expires: January 2, 1945. (Seal.)

[fol. 430] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AND ORDER GRANTING TEMPORARY SUSPENSION OF COMMISSION'S ORDER

It is hereby stipulated by and between all the parties by their respective counsel:

1. That counsel for all parties will cooperate to bring on for hearing on or before December 15, 1941, the Motion for Preliminary Injunction heretofore filed by plaintiffs and the defendant's Motion to Dismiss the Complaint or, in the alternative, for Summary Judgment.

2. Pending such hearing by this Court and the determination by it of plaintiffs' said Motion for Preliminary Injunction, the defendant Federal Communications Commission is suspending, and will take no steps for enforcement or application of, the Commission's Order of May 2, 1941, in Docket No. 5060, at last amended October 11, 1941, with respect to any failure by any radio station to comply with such Order.

3. Any party hereto may move before the Court to modify the terms of this stipulation to the same extent which such party would be entitled to had this stipulation been in the form of a temporary restraining order issued after hearing.

United States of America, by Samuel Brodsky, Special Assistant to the Attorney General. Federal Communications Commission, by Telford Taylor, General Counsel. Thomas E. Harris, Assistant General Counsel. National Broadcasting Company, Inc., by Wright, Gordon, Zachry, Parlin & Cahill, by John T. Cahill. Woodmen of the World Life Insurance Society, by Thomson, Wood & Hoffman, Attys., John B. Dawson. Stromberg Carlson Telephone Manufacturing Company, by Hill, Rivkins & Middleton, by Thomas H. Middleton.

So ordered: 11/12/41.

Learned Hand, U. S. C. J. John Bright, U. S. D. J. Henry W. Goddard, U. S. D. J.

[fol. 431] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AND ORDER GRANTING LEAVE TO INTERVENE

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto:

That the plaintiffs hereby consent to the appearance as of right in the above entitled proceedings of Mutual Broadcasting System, Inc. (which was a party in interest to the proceeding before the Federal Communications Commission entitled "In the Matter of the Investigation of Chain Broadcasting, Docket No. 5060"), pursuant to the provisions of Section 402 (a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C. A., Section 402 (a)) and of the Urgent Deficiencies Act (38 Stat. 219, 220; 28 U. S. C. A. Section 45 a), and that any party may enter an order upon this stipulation without notice to the others.

Dated New York, N. Y., December —, 1941.

Wright, Gordon, Zachry, Parlin & Cahill, Attorneys for National Broadcasting Company, Inc. Thomson, Wood & Hoffman, Attorneys for Woodmen of the World Life Insurance Society. Hill, Rivkins & Middleton, Attorneys for Stromberg Carlson Telephone Manufacturing Company. Samuel Brodsky, Special Assistant to the Attorney General for the United States of America, Telford Taylor, Thomas E. Harris, Attorneys for Federal Communications Commission. Leon Lauterstein, Attorneys for Mutual Broadcasting System, Inc.

So ordered, 12/29/41.

Learned Hand, U. S. Circuit Judge. John Bright, U. S. D. J. Henry W. Goddard, U. S. D. J.

[fol. 432] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, Defendants

MUTUAL BROADCASTING SYSTEM, INC., Intervener

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant,

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Interveners

Before: L. Hand, C. J., Goddard and Bright, D.JJ.

Upon motions before answer by the defendants under Rule 12 (b)(1) to dismiss for lack of jurisdiction the complainants in two actions brought under § 402 (a) of Title 47, U. S. Code, to enjoin and set aside certain regulations of the Federal Communications Commission.

John T. Cahill, for National Broadcasting Company. Charles E. Hughes, Jr., for the Columbia Broadcasting System. Telford Taylor and Thomas E. Harris, for the United States and the Commission. Louis G. Caldwell, for the Mutual Broadcasting System, Inc., Intervener.

OPINION

L. HAND, C. J.:

These actions were brought to declare invalid and set aside certain regulations originally promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941; in their final form they appear at the end of this opinion. After the actions were filed the Commission, on October 31, 1941, promulgated a further regulation in the form of a "minute", also appearing at the end of the opinion. Preparatory to the issuance

of the regulations the Commission had held hearings at [fol. 433] which nearly 9,000 pages of testimony were taken; among others whom it had invited to attend, were the two plaintiff "networks", which accepted and took part by introducing extensive evidence. When the regulations appeared, the "networks" brought the two actions at bar under § 402 (a) of Title 47, U. S. Code, to set them aside as beyond the powers of the Commission and as arbitrary, unreasonable and without basis in the evidence. Upon the complaints so filed and voluminous affidavits they then moved for a preliminary injunction against their enforcement pendente lite. In the action brought by the National Broadcasting Company, two "affiliated stations" have joined as parties plaintiff and the United States and the Commission were originally joined as defendants; in the action brought by the Columbia Broadcasting System it alone is plaintiff and the United States is the only defendant, but the Commission later intervened. A third "network", the Mutual Broadcasting System, intervened as a defendant in both actions. The United States and the Commission have countered the plaintiffs' motion by motions, made before answer, to dismiss the complaints for lack of jurisdiction over the subject-matter under Rule 12 (b) (1), and for summary judgment under Rule 56 (b). The Mutual Broadcasting System has answered and joined in the motions of the other defendants. All these motions having come on before Judge Goddard, he assembled a court composed of three judges, to whom the hearing was transferred in accordance with the Act of October 22, 1913 (38 St. L. 219).

Since we are deciding that the District Court for the Southern District of New York has no jurisdiction over the subject-matter of the actions either as a court of three judges or of one, it will not be necessary to consider the merits; nevertheless we must say something about the background of the regulations in order to make our discussion intelligible. The business of broadcasting depends for its support principally, if not altogether, upon advertising. The broadcasting is done by "stations", each "station" selecting programs which it thinks will be popular, either spoken, sung or instrumentally performed in its own studio, or relayed to it by a "network" as will appear. Interjected among these programs, occur those fervid importuni-

ties of advertisers, upon the results of which the "station" must depend for its revenue. A single "station" dependent upon its own programs alone would be very expensive to [fol. 434] operate, and its income would be small; especially if, as has become customary, it were to add to its advertising programs what are called "sustaining programs", which are not paid for, but which are thought to give a general popularity to the "station". These circumstances have long since resulted in the creation of "networks" of the kind with which the actions at bar are concerned; that is to say, in a widespread system of contracts of a single company with separate "stations" scattered all over the Union and known as "affiliates". The plaintiffs, National Broadcasting Company and the Columbia Broadcasting System, are two such "networks"; they own and operate broadcasting "stations" of their own, but, although they depend in part upon these as outlets, their principal reliance is upon their "affiliates". They originate a great variety of programs—usually in a studio of one of their owned "stations"—which they transmit by telephone to the "affiliates" for broadcasting. The audience of such a "network" in this way becomes the aggregate of the audiences of its "affiliated stations", and this enables it to charge so much higher prices for advertising than the "affiliates" could charge alone, that both they and the "network" can divide the returns to their common advantage. There are four such national "networks", two owned by the National Broadcasting Company (one of which we are told it has disposed of since these actions were begun), another by the Columbia Broadcasting System, and the fourth by the Mutual Broadcasting System, which has intervened because it feels itself aggrieved by the practices against which the regulations in suit were directed.

Every broadcasting "station" must have a license and the Federal Communications Commission alone has power to grant, refuse, revoke, renew or modify licenses. The Commission also has "authority to make special regulations applicable to radio stations engaged in chain broadcasting." § 303 (i). By virtue of these powers it assumed to promulgate the regulations now challenged, all of which it will be observed, are no more than declarations of the conditions upon which the Commission will in the future issue licenses to "stations". The defendants' motions to dismiss the complaints are based upon the theory that these

regulations are not "orders" within the meaning of § 402 (a), and that therefore this court has no jurisdiction over [fol. 435] them; indeed, that they are not "orders" of any sort, but merely announcements of the course which it will pursue in the future, whenever an "affiliated station" applies for a new license, or for the renewal of an existing one. To this the "networks" reply that the regulations had an immediate effect; that they not only announced what would be the future practice of the Commission, but presently adjudicated the invalidity of the contracts between themselves and their "affiliates"; and that they have in fact already caused serious losses, because a number of "affiliates" have declared that they will be obliged to break their contracts when their licenses are renewed, and have thus made it impossible for the "networks" to accept large and valuable advertising contracts.

We do not think that we need commit ourselves generally as to what "orders" are reviewable under the Act of October 22, 1913 (38 St. L. 219), which § 402(a) of Title 47, U. S. Code, incorporates by reference as the measure of our jurisdiction. So far as we have found, the Supreme Court has never declared that that statute authorizes review of any decision of an administrative tribunal which neither directs anyone to do anything, nor finally adjudicates a fact to exist upon which some right or duty immediately depends. We agree that it is no answer that the decision challenged is "legislative" in character, (The Chicago Junction Case, 264 U. S. 258, 263), and, as we have just implied, it is enough if it authoritatively determines the existence of a fact that at once sets in execution some sanction, though the decision itself be not in form a command. United States v. Baltimore & Ohio Railroad, 293 U. S. 454; Powell v. United States, 300 U. S. 276; Rochester Telephone Corporation v. United States, 307 U. S. 125; American Federation of Labor v. National Labor Relations Board, 308 U. S. 401, 408. (Colorado v. United States, 271 U. S. 153; Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382; and United States v. Idaho, 298 U. S. 105, though they are of the same kind, are scarcely controlling, because they turned upon § 1(20) of the Interstate Commerce Act.) But decisions which are no more than announcements of future administrative action have never, so far as we can find, been treated as within this statute. That does not necessarily imply that a person presently injured

is without any remedy when the threatened action would be [fol. 436] unlawful; the situation then may present all the elements upon which equity will intervene in ordinary course. Shields v. Utah Idaho Central Railroad Company, 305 U. S. 177. It may be that the plaintiffs at bar could bring such actions in equity; at least it does not appear that recourse to them is positively forbidden, as was for example the case in Venner v. Michigan Central, 271 U. S. 127. But even so they would not be the actions at bar, which can be brought only under the statute, since otherwise the United States cannot be sued, or the Commission sued in this district, assuming that it was in any event possible to join it at all. Such actions would have to depend jurisdictionally upon the same facts as any other action against a public officer who threatens to do an unlawful act.

We should therefore have a great deal of doubt whether the regulations could in any view be regarded as "orders" which we could review under the Act of October 22, 1913 (38 St. L. 219), if the case came to us under the statute in vacuo. It does not, because, although, as we have said, § 402 (a) incorporates it by reference, those orders are excepted which are mentioned in the parenthesis: to wit, all orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license." Relief from such orders is provided in § 402 (b), (c), (d), (e) and (f); it is by appeal to the Court of Appeals of the District of Columbia, and it is to be heard upon the record made at the hearing of an application by the Commission. The procedure upon such appeals is in substance the same as that which has now become standard for the review of the decisions of administrative tribunals in adversary proceedings. Consequently, if any of the "affiliates" of the plaintiff "networks" should hereafter apply for a renewal of their licenses; and if, as we assume it will, the Commission adheres to its regulations, the resulting modification of the license will be reviewable only in the Court of Appeals of the District and upon the record made at that hearing. We have seen, however, that the regulations are nothing more than a declaration—or if one chooses, a threat—by the Commission that it will impose those conditions upon any renewal of a license in the future. No change is made in the

status of "affiliates" meanwhile; their existing contracts with the "networks" remain enforceable; nor has the Com- [fol. 437] mission given any evidence of an intention to use them as the basis for a revocation of existing licenses under § 312 (a). On the contrary, the "minute" we have mentioned commits it to a contrary course. Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues. This is inexorably true because here the only question is whether the Commission has power to impose the conditions mentioned in the regulations when a "station" applies for renewal; exactly the question which will determine the actual renewal of a license. The prescribed procedure will therefore be disregarded only because the putative wrong is merely threatened, instead of being in the very act of commission. Whatever may ordinarily be the proper scope of the word "order" in the Act of October 22, 1913 (38 St. L. 219), it seems to us clear that Congress could not have intended such an anomalous result as will follow upon treating these particular regulations as such "orders".

To this the plaintiffs make two answers. First, they say that the threat itself has already caused them loss, as we have said. Possibly that might support an action to compel the Commission to raise the issues immediately, as by a revocation proceeding under § 312 (a); even so, it should not substitute another court for the Commission and the Court of Appeals, certainly not this court in an action against the United States and the Commission. We need not decide the point, however, because the "minute" we have quoted offers equivalent relief without risk to any "station" which may challenge the regulations. Next, the plaintiffs say that they may not be able to raise the issue in a proceeding for the renewal of a license, because the "affiliated stations" may fear to incur the Commission's displeasure. As to the National Broadcasting Company this is plainly untrue because two of its "affiliates" have joined it as plaintiffs. As to the Columbia Broadcasting System, its complaint, read most favorably, does perhaps allege that none of its "affiliates" will challenge the regulations when their licenses expire; at any rate, to avoid any doubts, we shall so assume, little as that seems

likely to be the case. We may do so, because the issue is irrelevant anyway, for the plaintiff "networks" have an adequate remedy under § 402 itself. They allege—and [fol. 438] there seems to be no question about it—that their interest will be adversely affected by the enforcement of the regulations; if so, they can appeal to the Court of Appeals of the District from any order imposing unlawful conditions upon an "affiliate's" license. § 402 (b) (2). It is true that the section does not in terms provide that they shall also be heard in the proceeding before the Commission under § 309 (a) for the "renewal or modification of a station license;" but the Commission has itself answered that objection by § 1.102 of its regulations which permits intervention. An unreasonable refusal of the privilege so offered would ap-ear to be a good objection on appeal under § 402 (b) (2); for it is not likely that the statute which grants an appeal to all interested parties, meant not to give them the opportunity to make a record on which they can succeed upon that appeal. At any rate until the Commission shows some disposition to deny them a fair hearing in a proceeding for renewal of an "affiliate's" license, we are not to assume that it will do so. And even if that should appear, the resulting right of action, if any, would not, as we have said, be in this court or against the United States. For the foregoing reasons the complaints will be dismissed for lack of jurisdiction over the subject-matter.

We do not understand that any findings of fact are proper under Rule 52(a), which provides for such findings only in "actions tried upon the facts without a jury." It is true that the plaintiffs have moved for a preliminary injunction, and that the rule also requires findings "in granting or refusing interlocutory injunctions;" but we are not "refusing" any injunction. Once the complaints are dismissed for lack of jurisdiction, the motions become moot and we shall not pass upon them at all. We are therefore entering judgment in each action without findings.

Complaints dismissed for lack of jurisdiction.

Learned Hand, Henry W. Goddard.

The Chain Broadcasting Regulations

Sec. 3.101. *Exclusive affiliation of station.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or im-

plied, with a network organization under which the station is prevented or hindered from, or penalized for broadcasting the programs of any other network organization.

[fol. 439] Sec. 3.102. *Territorial exclusivity.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Sec. 3.103. *Term of affiliation.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, expressed or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

Sec. 3.104. *Option time.*—No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8:- a. m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

Sec. 3.105. *Right to reject programs.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or im-

plied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing [fol. 440] network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

Sec. 3.106. *Network ownership of stations.*—No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

Sec. 3.107. *Dual network operation.*—No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

Sec. 3.108. *Control by network of station rates.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

The Minute of October 31, 1941

Procedure in Docket No. 5060

The Commission today adopted the following minute setting forth the procedure that it will follow in applying the policies announced in the Chain Broadcasting Regulations:

If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or [fol. 441] the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106, relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations.

Dissenting Opinion

Bright, D. J.:

As I read the opinion of my brothers, they would dismiss for want of jurisdiction because nothing reviewable has been done, and that even after a license is denied, the only review thereof would be by appeal to the Court of Appeals in the District of Columbia.

By Section 402-a of the Communications Act of 1934, we have jurisdiction to enjoin, set aside, annul or suspend an order of the Commission, except where it grants or refuses an application for a construction permit, for the

granting, renewal or modification of a station license, or suspending a radio operator's license. These excepted matters can be reviewed only by appeal to the Court of [fol. 442] Appeals aforesaid. This order, in my opinion, does not come within any of the excepted provisions. No application has been or is here made for any such relief, and the order sought to be reviewed does not arise out of any such application.

There is no question in my mind that the order sought to be reviewed is one which, under the terms of Section 402-a, we have jurisdiction to enjoin. It is designated by the defendants as a "commission order". It has the usual mandatory clauses found in orders. It was by its terms obviously entered after an investigation made upon the Commission's own motion to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity. It promulgates certain regulations, an obvious and attempted exercise of the Commission's rule-making power. It is clearly an attempt to make rules because at the time there was nothing else before the Commission upon which it could or did act. All of these rules, or regulations as they are called in the order, relate only to standard broadcasting stations having contracts with a network organization, except rule 3.106, which relates to a license to be granted to a network organization having more than one station in a service area, and rule 3.107 which proscribes a broadcasting station affiliated with a network maintaining more than one network. These rules do not apply to stations not affiliated with any network. They apply only to contractual relations with networks, and in addition, prohibit the ownership by a network of more than one station in a specified service area and the ownership by any organization of more than one network. The order fixes as immediately the time when it shall become effective. In other respects it has all the earmarks of a final order.

That it was intended to be final is further evidenced by the Commission's report. It finds that the public interest "requires" the application of the regulations to stations affiliated with regional as well as with national networks. It affirms its powers to do so under Section 303-(i) of the Communications Act, and clearly reveals that it is exercising its rule-making power when it queries whether the

Commission can formulate into "general rules and regulations" the principles which it *intends* to apply in passing on individual applications. That its action is final is fur- [fol. 443] ther emphasized by the statement, "We believe that the announcement of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice. * * * The regulations we are now adopting are nothing more than the expression of the general policy *we will apply* in exercising our licensing power. The formulation of a regulation in general terms is an important aid to *consistency and predictability* and does not prejudice any rights of the applicant."

That it is exercising this rule-making power is further emphasized by another statement in its report, that Section 303-(i) gives the Commission specific power to make special regulations appling to radio stations engaged in chain broadcasting and that "no language could more clearly cover *what we are doing here.*"

What it has done emphasizes more the finality of its order, which is an affirmative direction that thereafter no standard broadcasting station shall contract in terms prohibited, and ultimately puts an end to service by networks under contracts now existing. In fact, I think that the regulations are intended to effect existing contracts for the effective date of the order is deferred until November 15th, 1941, "with respect to existing contracts, arrangements or understandings". This certainly is not a statement that the regulations shall not apply to existing contracts; it is merely a postponement as to when the axe will fall.

The particular agreements prohibited are presently contained in most of the affiliation contracts of the two complaining networks. They state those provisions are essential to the proper and successful conduct of their business, and in deciding the question of jurisdiction, I believe we must assume this to be true. It is also shown by them, without contradiction, that between the time the regulations were promulgated and the commencement of these actions, not less than twenty-four broadcasting stations having affiliation contracts with N.B.C. have cancelled their contracts as a result of the order in question, and not less than twenty-four others having such contracts, have served notice that they do not intend to abide by the terms of such contracts unless they are conformed to the Commission's order. Similarly, it is shown by the affidavits sub-

mitted by C.B.S. that some of the stations affiliated with it are refusing to renew their affiliation contracts, some are [fol. 444] threatening to cancel or repudiate them, and some have already cancelled on the ground that the rules in question prohibit them. There is thus a present injury.

It is suggested that the plaintiffs must wait until the Commission has ruled upon the application of a broadcasting station for a renewal of its license. Can it be said that the Commission will change its rules, in view of the positive statement it has already made with reference thereto and above quoted? Must these networks await the idle ceremony of a denial of a license before any relief can be sought when it is perfectly obvious that no relief will be given? And what relief could they get if they did wait? The networks are not to be licensed, only the individual stations who make application. But it is said the net works could intervene and be heard. All that might be said or urged in their behalf has doubtless been communicated to the Commission in the three years between March 18, 1938, and May 2, 1941, when the investigation was going on. Must they march up the hill and down again, with the probability of being met with the statement that the Commission has given the matter due consideration and has done what it intends to abide by, as it has definitely said in its report? It is said, however, that by a minute adopted after these actions were brought, the Commission has manifested its intention to permit the net works to intervene and be heard upon the subject of the granting or denial of the license. That minute refers obviously only to a station, and insofar as it attempts to change the nature of the order sought to be reviewed or to obviate a review would be abortive. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433-452. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498-515.

This court has reviewed the rule-making power of this very Commission without being troubled by the question of jurisdiction. *A. T. & T. Co.* v. *U. S.*, 14 F. Supp. 121, affirmed 299 U. S. 232. That there can be a review of an order exercising the delegated legislative function of rate-making and rule-making is admitted in *U. S.* v. *Los Angeles R. R.*, 273 U. S. 299, 309. In *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, where bills were filed to enjoin orders prescribing methods of account, book-

keeping and reports, jurisdiction was not questioned in a court always jealous of its jurisdiction. In *Kansas City* [fol. 445] *Southern Railway* v. *U. S.*, 231 U. S. 423, jurisdiction was again assumed of a petition to declare invalid and to enjoin regulations relative to accounting. In *Skinner & Eddy Corp.* v. *U. S.*, 249 U. S. 557-562, which involved a refusal of a suspension of a tariff, jurisdiction was assailed, at least until after a further remedy was sought; and it was there stated that where contention was made that the Commission had exceeded its statutory powers, courts have jurisdiction of suits to enjoin even if the plaintiff had not attempted to secure redress before the Commission. In the *Assigned Car Cases*, 274 U. S. 564, suits were brought to enjoin and annul an order which prescribed a rule governing the distribution of cars among coal mines after an investigation by the Interstate Commerce Commission of its own motion, and no question of right of review was raised. And in *A. F. of L.* v. *Labor Board*, 308 U. S. 401, 408, it was admitted that administrative determinations which are not commands may for all practical purposes, determine rights as effectively as the judgment of a court and may be re-examined by courts under particular statutes providing for the review of orders. In *Pierce* v. *Society of Sisters*, 268 U. S. 510, suit was brought by a private school to restrain the enforcement of an Oregon statute which required primary education in public schools, and jurisdiction was sustained, Mr. Justice McReynolds writing that the suits were not premature, that the injury to the plaintiffs was present and very real and not a mere possibility in the remote future.

Dated: February 20, 1942.

(S.) John Bright, U. S. D. J.

[fol. 446] District Court of the United States, Southern District of New York

Civil Action No. 16-178

National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society, and Stromberg Carlson Telephone Manufacturing Company, Plaintiffs,

v.

The United States of America and The Federal Communications Commission, Defendants

Mutual Broadcasting System, Inc., Intervener

Order Dismissing Complaint—Filed February 21, 1942

Before: L. Hand, C. J., and Goddard and Bright, D.JJ.

This cause came on to be heard at the January, 1942 term of this court and was argued by counsel; and thereupon, and upon consideration thereof it is

Ordered, adjudged and decreed that the complaint herein be, and the same hereby is, dismissed because the court has no jurisdiction over the subject-matter of the action.

Learned Hand, Circuit Judge; Henry W. Goddard, District Judge; —— —— District Judge.

In United States District Court for the Southern District of New York

[Title omitted]

Notice of Motion

Sirs:

Please take notice that the undersigned will bring the annexed motion on for hearing before this Court at Room No. 110, United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 27th day of February, 1942 at 3:00 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard.

Wright, Gordon, Zachry, Parlin & Cahill, by John T. Cahill, a member of the firm, Attorneys for Nat-

[fol. 447] tional Broadcasting Company, Inc., Office and Post Office Address, 63 Wall Street, Borough of Manhattan, City, County and State of New York.

Thomson, Wood and Hoffman, by John B. Dawson, a member of the firm, Attorneys for Woodmen of the World Life Insurance Society, Office and Post Office Address, 48 Wall Street, Borough of Manhattan, City, County and State of New York.

Hill, Rivkins and Middleton, by Thomas H. Middleton, a member of the firm, Attorneys for Stromberg Carlson Telephone Manufacturing Company, Office and Post Office Adress, 60 Wall Street, Borough of Manhattan, City, County and State of New York.

To:

Samuel Brodsky, Esq., Special Assistant to the Attorney General, Attorney for the United States of America, United States Court House, Foley Square, New York, N. Y.

Telford Taylor, Esq., General Counsel, Federal Communications Commission, Washington, D. C.

Leon Lauterstein, Esq., Attorney for Mutual Broadcasting System, Inc., 15 William Street, New York, N. Y.

In United States District Court for the Southern District of New York

[Title omitted]

Motion for Temporary Restraining Order

Upon the complaint and all the affidavits and other papers filed, and all the proceedings heretofore had, herein, the plaintiffs move this Court for an order suspending and restraining the operation, enforcement or execution of the order of the Federal Communications Commission in Docket No. 5060 made May 2, 1941, as amended October 11, 1941 (in so far as the order purports to become effective on or before November 15, 1941), pending the hearing and determination of an appeal to be taken by the plaintiffs to the Supreme Court of the United States from the order or decree of this Court entered February 21, 1942, dismissing the complaint herein on the ground that this Court has no [fol. 448] jurisdiction over the subject matter of this ac-

tion; and for such other and further relief as to the Court may seem just.

Wright, Gordon, Zachry, Parlin & Cahill, by John T. Cahill, a member of the firm, Attorneys for National Broadcasting Company, Inc., Office and Post Office Address, 63 Wall Street, Borough of Manhattan, City, County and State of New York.

Thomson, Wood and Hoffman, by John B. Dawson, a member of the firm, Attorneys for Woodmen of the World Life Insurance Society, Office and Post Office Address, 48 Wall Street, Borough of Manhattan, City, County and State of New York.

Hill, Rivkins and Middleton, by Thomas H. Middleton, a member of the firm, Attorneys for Stromberg Carlson Telephone Manufacturing Company, Office and Post Office Address, 60 Wall Street, Borough of Manhattan, City, County and State of New York.

Goodwin, Nixon, Hargrave, Middleton & Devans, Office and P. O. Address, 31 Exchange Street, Rochester, N. Y., of Counsel for Stromberg Carlson Telephone Manufacturing Company.

[fol. 449] IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION, Defendants

MUTUAL BROADCASTING SYSTEM, INC., Intervenor

Civil Action No. 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant,

THE FEDERAL COMMUNICATIONS COMMISSION AND MUTUAL BROADCASTING COMPANY, INC., Intervenors

Before L. Hand, C. J.; Goddard and Bright, D. J. J.,

OPINION

PER CURIAM:

The Commission is of course right in saying that we have decided that the plaintiffs have adequate protection outside of these actions and in spite of their dismissal; nevertheless, in deciding whether a stay should be granted pending an appeal, we must assume that we may be mistaken, certainly a not unreasonable assumption in view of Judge Bright's dissent. If so, the plaintiffs will not be adequately protected, and indeed they may not be anyway if the Commission does not withhold enforcement in all cases until the issues could be once and for all determined in a renewal proceeding. Considering on the one hand that if the regulations are enforced the networks will be obliged to revise their whole plan of operations to their great disadvantage, and on the other that the Commission itself gave no evi-

dence before these actions were commenced that the proposed changes were of such immediately pressing importance that a further delay of two months will be a serious injury to the public, it seems to us that we should use our discretion in the plaintiffs' favor to stay enforcement of the regulations until they can argue their appeal. For these reasons we will grant such a stay until the argument of the appeal before the Supreme Court or the first day of [fol. 450] May, 1942, whichever comes first. For any further stay the plaintiffs must apply to the Supreme Court itself, or to the Circuit Justice.

Learned Hand, U. S. C. J., Henry W. Goddard, U. S. D. J., John Bright, U. S. D. J.

IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

FINDINGS OF FACT

I. That if the Federal Communications Commission, pending the plaintiffs' appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; and if this court —contrary to its said judgment—has in fact jurisdiction over the cause of action stated in the complaint; the plaintiffs will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to the plaintiffs arising from its enforcement, if the conditions mentioned in the First Finding exist.

CONCLUSION OF LAW

That the plaintiffs are entitled to a stay pending their appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of May, 1942, whichever is earlier.

Learned Hand, U. S. C. J., Henry W. Goddard, U. S. D. J., John Bright, U. S. D. J.

[fols. 451-464] IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

DECREE GRANTING TEMPORARY RESTRAINING ORDER

This cause came on to be further heard at the February, 1942, term of this Court and was argued by counsel and thereupon, upon consideration thereof, it appearing that the relief herein granted is necessary to preserve the status quo pending an appeal by the plaintiffs to the Supreme Court, for the reasons appearing in the Opinion, and Findings of Fact and Conclusion of Law, filed herewith, it is

Ordered, Adjudged and Decreed that until May first, 1942 or the argument of the appeal herein to the Supreme Court of the United States, whichever is earlier, the Federal Communications Commission be and the same hereby is restrained from enforcing those regulations which were issued in their amended form on October 11, 1942, and which are known as "Order in Docket No. 5060."

Learned Hand, U. S. C. J.; Henry W. Goddard, U. S. D. J.; John Bright, U. S. D. J.

[fol. 465] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941.

No. 1025

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, Appellants,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.

Appeal from the District Court of the United States for the Southern District of New York.

[June 1, 1942.]

Mr. Chief Justice STONE delivered the opinion of the Court.

This is a companion case to No. 1026, *Columbia Broadcasting System, Inc.* v. *United States*, decided this day. Both present substantially similar facts and the same issues of law.

Appellant, National Broadcasting Company, maintains two radio broadcasting systems, the "blue network" and the "red network". The two other appellants operate radio broadcasting stations licensed by the Communications Commission, and have entered into contracts with National similar to those involved in the *Columbia* case and to those of other stations which participate in National's networks.

[fol. 466] Appellants brought the present suit in the Southern District of New York to set aside the order of the Commission of May 2, 1941, as amended by its order of October 11, 1941, promulgating the Chain Broadcasting Regulations which we considered in the *Columbia* case, on the grounds that the order is beyond the Commission's statutory authority or, if within it, that the statute is an unconstitutional delegation of the legislative power of Congress in violation of Article I, § 1 of the Constitution, and operates to deprive appellants of property without the due process of law guaranteed by the Fifth Amendment.

The district court of three judges dismissed the complaint, — F. Supp. —, holding that the Commission's order

is not reviewable under the provisions of § 402(a) of the Communications Act of 1934, 48 Stat. 1093, 47 U. S. C. § 402(a), and the Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. § 47, but stayed the operation of the order pending direct appeal to this Court.

According to the allegations of the bill of complaint, National conducts its broadcasting business in substantially the same manner as Columbia. It establishes telephone wire connections with licensed broadcasting stations with which it enters into contracts for limited periods for chain broadcasting of its radio programs. These contracts do not require that the station shall broadcast the programs of no other chain than National. But a feature of them is the option given to National for use of the station on 28 days' notice for certain specified periods of radio time in broadcasting commercial network programs provided by National. It is alleged that because of the contract provisions the regulations will require the stations affiliated with National to abandon their contracts or lose their licenses either by the Commission's cancellation of or refusal to renew them. The bill of complaint makes a sufficient showing of irreparable injury to National, including an allegation that forty-eight affiliated stations have served notice of abrogation of the contracts.

[fol. 467] For the reasons stated at length in the opinion in the *Columbia* case, we hold that the order of the Commission is reviewable in the present suit by the district court of three judges. The bill of complaint states a cause of action in equity. The judgment will accordingly be reversed and the cause remanded for further proceedings.

Unlike the *Columbia* case, the record discloses no facts showing what effect the Commission's minute adopted after the present suit was brought has had or will have upon the cancellation of appellants' contracts by the affiliated stations. So far as relevant that will be a matter for consideration by the court below, as will be the question, not considered here, whether the appellants other than National are proper parties plaintiff.

As in the *Columbia* case the stay now in effect will be continued, on terms to be settled by the court below.

Reversed.

Mr. Justice Black took no part in the consideration or decision of this case.

Mr. Justice Reed, Mr. Justice Frankfurter and Mr. Justice Douglas dissent for the reasons set forth in the dissenting opinion in No. 1026.

[fol. 468] Supreme Court of the United States, October Term, 1941

No. 1026

Columbia Broadcasting System, Inc., Appellant,

vs.

The United States of America, Federal Communications Commission and Mutual Broadcasting System, Inc.

Appeal from the District Court of the United States for the Southern District of New York

[June 1, 1942]

Mr. Chief Justice Stone delivered the opinion of the Court:

The Federal Communications Commission, by its order of May 2, 1941, as amended by its order of October 11, 1941, promulgated regulations which purport to require the Commission to refuse to grant a license to any broadcasting station which enters into certain defined types of contract with any broadcasting network organization. These regulations, it is alleged, affect adversely appellant's contractual relations with broadcasting stations and impair its ability to carry on its business in maintaining and operating its nationwide broadcasting network. The regulations as amended on October 11, 1941, together with a supplemental "minute" promulgated by the Commission on October 31, 1941, are set forth at the end of this opinion. The question for our decision is whether appellant is entitled to secure a judicial review of the order by a suit brought under § 402(a) of the Communications Act of 1934, 48 Stat. 1093, 47 U. S. C. § 402(a), and the Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. § 47.

[fol. 469] Pursuant to § 402(a) appellant brought the present suit against the United States in the Southern District of New York, to enjoin enforcement of the Commission's

order as contrary to the public interest and beyond the Commission's statutory authority, and on the further ground, if the order be deemed within that authority, that the statute is an unconstitutional delegation of legislative power by Congress in violation of Article I, § 1 of the Constitution, and operates to deprive appellant of property without due process of law in violation of the Fifth Amendment. The case was heard by a court of three judges, which permitted the Commission and the Mutual Broadcasting Company to intervene as defendants. It granted appellees' motion to dismiss the complaint for want of jurisdiction, — F. Supp. —, and stayed the operation of the Commission's order pending direct appeal to this Court.

In 1938 the Communications Commission authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity". Extensive hearings were held by a committee consisting of three members of the Commission, at whose request the national networks, including appellant, intervened. In June, 1940, the committee made a report, on the basis of which briefs were filed and oral argument was presented before the full Commission by the three national networks and other interested parties. In May, 1941, the Commission issued its "Report on Chain Broadcasting" and ordered the adoption of the regulations which, in their amended form, are the subject of the present controversy.

The relevant facts stated in the bill of complaint are as follows: Appellant or its predecessor has been engaged in the business of nationwide network or chain broadcasting since 1927. It has a large amount of physical property used in the business and has built up a valuable goodwill. For its broadcasts it maintains a staff of employees and expends large amounts for musicians and broadcasting performers. [fol. 470] It has commitments by long-term contracts aggregating more than $4,000,000 for broadcasting expenditures, including those for the use of land and buildings and for the furnishing of news and broadcasting programs in the next few years. Appellant's total property devoted to its broadcasting business exceeds $18,000,000 in value; its earnings from the network exceeded $3,000,000 in both 1939 and 1940.

Chain broadcasting is the means by which radio programs are made available to all or a large part of the nationwide radio audience. It is defined by the Communications

Act, 47 U. S. C. § 153(p), as the "simultaneous broadcasting of an identical program by two or more connected stations". The chain broadcaster prepares radio programs, for which it engages performers in advance, and simultaneously broadcasts them over a large number of radio stations to which the programs are transmitted from some central point of origination by wire telephone lines leased by the broadcaster, here the appellant. The programs, which are prepared well in advance of the broadcast and given by persons employed for the purpose by appellant, are of two classes—commercial programs sponsored and paid for by advertisers, and sustaining programs furnished by appellant and not paid for by any advertiser.

Appellant's network comprises 123 stations in 122 cities in the United States. It is so operated as to enable ninety per cent of the radio audience of the United States to listen simultaneously to programs provided by appellant and broadcasted over these stations. Appellant owns and operates seven of the stations and leases an eighth, all licensed by the Commission. With the remaining 115 stations it enters into individual contracts usually for periods of five years, terminable in some instances by appellant on twelve months' notice. By these contracts appellant undertakes to furnish each station with an average of at least sixty hours per week of network sustaining and sponsored programs. The sustaining programs are furnished without charge, the station being free to use them or not as it [fol. 471] chooses. Appellant undertakes to furnish the station with all commercial programs which the sponsor requests the station to broadcast and to pay the station a specified hourly rate for the use of its facilities in broadcasting such programs. Appellant agrees not to furnish its programs to other stations in the same city; the affiliated station, with exceptions not now material, agrees not to broadcast the program of any other network. Of critical importance in the present litigation is the stipulation of the affiliated station that it will, upon not less than twenty-eight days' notice from appellant, broadcast the sponsored or commercial program furnished to it by appellant for at least fifty "converted" hours (averaging seventy-nine regular clock hours) per week.

These provisions of appellant's contracts are alleged to be indispensable to the maintenance and efficient operation of its network and to the existence of a strong and efficient

network broadcasting system, and necessary to enable appellant to compete with other advertising media. On May 2, 1941 the Commission issued its order which, as amended by its order of October 11, 1941, promulgated the "Chain Broadcasting Regulations" of which appellant complains, and which the Commission characterized in its Report as "the expression of the general policy we will follow in exercising our licensing power".[1] The regulations provide that no license shall be granted to a broadcast station having contracts with a network organization, containing any [fol. 472] of several provisions which are characteristic of appellant's contracts with its affiliates. These include provisions by which the station is prevented from broadcasting the programs of any other network organization (3.101); or which prevent another station serving substantially the same area from broadcasting the network programs not taken by the station applying for license, or prevent another station serving a substantially different area from broadcasting any program of the network organization (3.102); or by which the station contracts for affiliation with the network for a period longer than two years (3.103); or by which the station "options for network programs any time subject to call on less than 56 days' notice or more time than a total of three hours" within each of four specified segments of the broadcast day, the

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[1] The Commission in its Report says, p. 85:

"We believe that the announcement of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice.

"Announcements of policy may take the form of regulations or of general public statements. In either case, the applicant's right to a hearing on the question whether he does in fact propose to operate in the public interest is fully preserved. The regulations we are adopting are nothing more than the expression of the general policy we will follow in exercising our licensing power. The formulation of a regulation in general terms is an important aid to consistency and predictability and does not prejudice any rights of the applicant. Good administrative practice would seem to demand that such a statement of policy or rules and regulations be promulgated wherever sufficient information is available upon which they may be based."

regulation declaring "such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations" (3.104); or which prevent the station (a) from rejecting network programs which the station reasonably believes to be unsatisfactory or unsuitable or (b) from substituting for the network program a program of outstanding local or national importance (3.105).

After making its order of May 2, 1941, the Commission deferred its effective date until further order. By its order of October 11, 1941, the Commission fixed the effective date as November 15, 1941, and directed "that the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties", and "that the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

[fol. 473] The bill of complaint also alleges that the purpose and effect of the regulations are to prohibit station licensees from having agreements of the kind which appellant has with its affiliates; that prior to the order of May 2, 1941, it was the practice of the Commission to renew the licenses of stations annually and that the licensed stations have had a reasonable expectancy of the annual renewal of their licenses; that 115 licensed stations have such contracts with appellant expiring at various times between the original effective date of the regulations and December 31, 1947. It is alleged that when their current licenses expire, at the latest, and perhaps earlier through the revocation of existing licenses, such stations face the loss of their licenses if they perform or continue in force or renew any existing contracts containing the described provisions.

The bill alleges that since the stations fear the loss of their licenses, as a result of the regulations, they will not negotiate for or renew affiliation contracts containing such provisions. And because they fear the loss of their licenses

the stations have threatened to cancel and repudiate their affiliation contracts, and many have notified appellant that they will not be bound by their contracts after the regulations become effective. As a consequence appellant's ability to conduct its business and maintain its public broadcasting service is seriously impaired and the regulations will make the operation of appellant's business more costly, reduce its earnings and render its property and business less valuable.

The bill of complaint was filed October 30, 1941. The following day the Commission promulgated a supplemental "minute" setting up a procedure by which the validity of the regulations might be tested upon application for a license by an individual licensee. The minute declared that if a station wished to challenge the regulations the Commission would grant a temporary extension of its license until there had been a final court determination of the issues. In the event of such litigation, and if the validity of the regulations were sustained, "the Commission will [fol. 474] nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision".

An affidavit subsequently submitted by appellant in support of its motion for a temporary injunction states that since the Commission's minute of October 31st, appellant has continued to receive indications that its affiliates will cancel and repudiate their contracts and refuse to renew them, and has received no indication that the minute has or will have the effect of inducing stations to assume the burden of testing the validity of the regulations. Attached to the affidavit are letters from five affiliates, written after October 31st, indicating their intention not to be bound by the contracts. The affidavit also states appellant's belief that it would have received more such letters had it not been for its circulation of information concerning the pendency of this suit.

Accepting the allegations of the complaint as true, as for present purposes we must, it is evident that application by the Commission of its regulations in accordance with their terms would disrupt appellant's broadcasting system and seriously disorganize its business. As the bill alleges, station licenses have been renewable by the Commission annu-

ally,[1] whereas appellant's contracts are for five year periods and many of them will survive the expiration of the existing licenses to the affiliated stations. Under Regulations 3.101, 3.102, 3.103, and 3.104, each affiliate must repudiate his contract or be denied the renewal of his license. In either case this would deprive appellant of the station's participation in its network, for which its contracts call.

Regulation 3.104 not only requires all options by appellant to be exercised on 56 days' rather than 28 days' notice as at present, but provides that no option time is exclusive of other networks, and thus allows to appellant no option time within which it can command the use of affiliated stations for any program for broadcasting on a national scale. [fol. 475] These sections together thus operate to break down the network enterprise in which appellant and its affiliates are by their contracts cooperating, and to substitute a system in which every station is available to every network on a "first come first served basis".

The Commission concedes by its brief that as provided by § 312(a) "Any station license may be revoked * * * because of conditions revealed by such statements of fact as may be required [of a licensee] from time to time which would warrant the Commission in refusing to grant a license on an original application". Consequently the regulations by their terms, read in conjunction with § 312(a), expose licensees, who renew their affiliation contracts, to revocation proceedings by the Commission whenever upon a statement which the Commission may require it appears that the licensee has entered into an affiliation contract which the regulations proscribe.

A proceeding to set aside an order of the Commission under § 402(a) and the Urgent Deficiencies Act is a plenary suit in equity. Hence the questions raised by the motion to dismiss are whether the Commission's order is an "order", review of which is authorized by § 402(a) of the Act, and if so whether the bill states a cause of action in equity. The suit cannot be maintained unless both questions are answered in the affirmative.

Section 402(a) makes applicable the provisions of the Urgent Deficiencies Act to "suits to enforce, enjoin, set

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[1] On October 11, 1941, the Commission amended Regulation 3.34 to make the normal license period two years.

aside, annul, or suspend any order of the Commission" except orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license". Review of the orders excepted from § 402(a) is by appeal to the Court of Appeals of the District of Columbia under the provisions of § 402(b). See *Scripps-Howard Radio, Inc.* v. *Federal Communications Comm'n*, 315 U. S. —. Since the [fol. 476] Commission's order neither grants, denies nor modifies any license, any review in advance or independently of an application for a station license must be under § 402(a), and then only if the Commission's order promulgating the regulations is an "order" within the meaning of this section. The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive. *Powell* v. *United States*, 300 U. S. 276, 284-85; *A. F. of L.* v. *Labor Board*, 308 U. S. 401, 408.

The Commission's investigation of the contractual relations between the networks and the stations, which resulted in the order now under attack, was for the stated purpose of prescribing regulations of such relationships. The order authorizing the investigation recited that the proceeding was taken under § 303(i) of the Act, which gives the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting". Since the Commission is not in terms given authority to regulate contractual relations between the stations and the networks, regulation of them could be accomplished only by regulating licensed radio stations which participate in chain broadcasting. It was by regulations in terms applicable to such stations that the Commission sought to control their contractual relationships with the networks.

The order is thus in its genesis and on its face, and in its practical operation, an order promulgating regulations which operate to control such contractual relationships, and it was adopted by the Commission in the avowed exercise of its rule-making power. Such regulations which affect or determine rights generally, even though not directed to any particular person or corporation, when lawfully promulgated by the Interstate Commerce Commis-

sion, have the force of law and are orders reviewable under the Urgent Deficiencies Act. *Assigned Car Cases*, 274 U. S. 564; *United States* v. *B. & O. R. Co.*, 293 U. S. 454. And regulations of like character, by which the Communications [fol. 477] Commission has prescribed generally the records and accounts to be kept by telephone companies subject to its jurisdiction, are similarly reviewable under § 402(a). *A. T. & T. Co.* v. *United States*, 299 U. S. 232.

The regulations here prescribe rules which govern the contractual relationships between the stations and the networks. If the applicant for a license has entered into an affiliation contract, the regulations require the Commission to reject his application. If a licensee renews his contract, the regulations, with the sanction of § 312(a), authorize the Commission to cancel his license. In a proceeding for revocation or cancellation of a license, the decisive question is whether the station, by entering into a contract, has forfeited its right to a license as the regulations prescribe. It is the signing of the contract which, by virtue of the regulations alone, has legal consequences to the stations and to appellant. The regulations are not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract. If an administrative order has that effect it is reviewable and it does not cease to be so merely because it is not certain whether the Commission will enforce the penalty incurred under its regulations for noncompliance. *Assigned Car Cases, supra; A. T. & T. Co.* v. *United States, supra.*

The regulations are rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the grounds specified in the regulations without more. If the regulations are valid they alter the status of appellant's contracts and thus determine their validity in advance of such proceedings. By striking them down by a determination proclaimed in advance that licenses shall be cancelled or refused because of a previous failure to comply with the regulations, they impose a penalty and sanction for noncompliance far more drastic than the fines customarily inflicted for breach of reviewable administrative orders.

[fol. 478] Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. And in this case it is alleged without contradiction that numerous affiliated stations have conformed to the regulations to avoid loss of their licenses with consequent injury to appellant.

Such regulations have the force of law before their sanctions are invoked as well as after. When as here they are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of § 402(a) and the Urgent Deficiencies Act. *A. T. & T. Co.* v. *United States, supra; Rochester Tel. Corp.* v. *United States*, 307 U. S. 125; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *Kansas City So. Ry.* v. *United States*, 231 U. S. 423; *Assigned Car Cases, supra; Chicago R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80; *United States* v. *B. & O. R. Co., supra.*

It is no answer to say that the regulations are addressed only to the Commission and merely prohibit it from granting—and authorize it to cancel—licenses in the case of all stations entering into such contracts, and that accordingly all stations are left free to enter into contracts or not as they choose. They are free only in the sense that all those who do not choose to conform to regulations which may be determined to be lawful are free by their choice to accept the legal consequences of their acts. Failure to comply with [fol. 479] the regulations entails such consequences to the station owner and to appellant. These are the loss of the affiliated stations' licenses if they adhere to their contracts, and disruption of appellant's network through the declared unlawfulness of the contracts, if the regulations are valid.

The purposes sought to be accomplished by § 402(a) and the Urgent Deficiencies Act would be defeated if a

suitor were unable to resort to them to avoid reasonably anticipated irreparable injury resulting from such legal consequences of the Commission's order, merely because the Commission as yet has neither refused to renew a license, as the regulations require, nor cancelled a license, as the regulations permit. Such an argument addressed to the form rather than the substance of the order was rejected in *Powell* v. *United States, supra;* cf. *A. F. of L.* v. *Labor Board, supra,* 408. The *Powell* case likewise repudiates the suggestion that merely because the order is not in terms addressed to those whose rights are affected, they cannot seek its review. See also *Western Pacific* v. *South. Pac. Co.,* 284 U. S. 47; *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382.

The order here is not one, as the Government argues and as the court below seemed to think, where the complainant's rights are affected only on the contingency of future administrative action as in *United States* v. *Los Angeles R. R.,* 273 U. S. 299; cf. *Rochester Telephone Corp.* v. *United States, supra,* 130. As the Court declared in the *Los Angeles* case, 309, 310, reviewable orders are "an exercise either of the quasi-judicial function of determining controversies or of the delegated function of rate making and rule making". And the Court pointed out that the "so-called order" in that case did not "determine any right or obligation" or change the plaintiff's "existing or future status or condition", and that it was "merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission" and "is the exercise solely of the function of investigation.

[fol. 480] Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend upon future administrative action. Instead they operate to control such action and to determine in advance the rights of others affected by it. The Commission gave its own recognition that such is their operation by its successive postponements of the effective date of the order for a period now expired, and by its suspension of Regulations 3.106 and 3.107, in order to enable the networks to dispose of their properties.

Of course the Commission was at liberty to follow a wholly different procedure. Instead of proclaiming general regulations applicable to all licenses, in advance of any specific contest over a license, it might have awaited such a contest to declare that the policy which these regulations embody represents its concept of the public interest. As a matter of sound administrative practice, both the rule-making proceeding and the specific license proceeding undoubtedly have much to commend them. But they are by no means the same, nor do they necessarily give rise to the same kind of judicial review. Having adopted this order under its rule-making power, the Commission cannot insist that the appellant be relegated to that judicial review which would be exclusive if the rule-making power had never been exercised and consequently had never subjected appellant to the threatened irreparable injury.

The court below assumed that if appellant had any equitable cause of action, it must be prosecuted in an ordinary suit and not under the provisions of the Urgent Deficiencies Act. But we think this mistakes both the nature of the regulations and the purpose of suits under that Act, as incorporated in § 402(a). Such a cause of action obviously can arise only because of the operation of the regulations. The regulations are the effective implement by which the [fol. 481] injury complained of is wrought, and hence must be the object of the attack. It is because they are an exercise of the rule-making power, and because they presently determine rights on the basis of which the Commission is required to withhold licenses and authorized to cancel them, that there is an order within the meaning of § 402(a) and the Urgent Deficiencies Act.

The Commission argues that since its Report characterized the regulations as announcements of policy, the order promulgating them is no more subject to review than a press release similarly announcing its policy. Undoubtedly regulations adopted in the exercise of the administrative rule-making power, like laws enacted by legislatures, embody announcements of policy. But they may be something more. When, as here, the regulations are avowedly adopted in the exercise of that power, couched in terms of command and accompanied by an announcement of the Commission that the policy is one "which we will follow in exercising our licensing power", they must be taken by

those entitled to rely upon them as what they purport to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the Commission and all others whose rights may be affected by the Commission's execution of them. The Commission's contention that the regulations are no more reviewable than a press release is hardly reconcilable with its own recognition that the regulations afford legal basis for cancellation of the license of a station if it renews its contract with appellant.

Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause [fol. 482] to be revoked. *Chicago Junction Case*, 264 U. S. 258, 266-68; *Western Pacific* v. *South. Pac. Co., supra; Claiborne-Annapolis Ferry Co.* v. *United States, supra;* compare, in the case of an attack upon the validity of a statute, *Truax* v. *Raich*, 239 U. S. 33, 38-39; *Pierce* v. *Society of Sisters*, 268 U. S. 510.

What we have said of the allegations of the complaint, and of the effect of the Commission's order if those allegations are sustained upon the trial, is enough to establish the threat of irreparable injury to appellant's business and to show also that the injury can not be avoided, as the Commission suggests, by appellant's intervention in proceedings upon applications for renewal of licenses by its affiliates or in proceedings to cancel their licenses, if and when such proceedings are instituted. Appellant has sufficiently alleged that the affiliates are cancelling or threatening to cancel their contracts in order to conform to the regulations. It is to avoid the irreparable injury which would result from such wholesale cancellations of its contracts, induced by the force of the regulations, that appellant makes its attack on them now rather than in later proceedings on the individual applications for licenses in those cases, if any, in which the stations are willing to seek licenses without complying with the prerequisites laid down by the regulations.

The issues in such a proceeding are not necessarily the same as the issues here. Intervention in it would afford appellant no assurance either of an adjudication of appellant's contentions or that the action of other stations would be governed by it. Moreover, if the Commission's order is as we hold a reviewable order, appellant is free to seek review under § 402(a). It is not thereby, as the court below seemed to think, improperly substituting a different procedure and court for that which Congress has prescribed for the trial of like issues so far as they may be raised on review of an order denying a license. Such issues may likewise be involved in a proceeding, upon the Commission's own motion, for modification or cancellation of a license, which concededly is reviewable under § 402(a). See *Scripps-Howard* [fol. 483] *Radio, Inc.*, v. *Federal Communications Commission, supra.* But review of the order by a licensee in such a proceeding affords no adequate remedy. If ever instituted, which is uncertain, it would come too late to save appellant from the injury wrought by the outlawry of its contracts.

Nor does the Commission's minute, filed after the present suit was brought, afford an adequate basis for requiring appellant to seek relief by intervention in a proceeding on application for a license reviewable under § 402(b). In that event the minute would not operate to broaden the issues involved in the renewal application. Nor would it afford a basis for restraining enforcement of the regulations as to other affiliated stations, pending adjudication of the validity of the regulations. Without full exploration of the subject, such as can be had only at the trial, we cannot say that the minute will afford a sufficient inducement to persuade the affiliated stations to cease cancellations and assume the initiative in litigating the validity of the regulations and of the contracts which they undertake to condemn. The affidavit filed in the court below on the application for a stay is to the contrary. And in any case we are of the opinion that there are no equitable principles by which the right of appellant, upon the showing made by its complaint and affidavit, to test the order under § 402(a) can justly be suspended to await action which the station owners may or may not take in assuming the burden of challenging the regulations.

We need not stop to discuss here the great variety of administrative rulings which, unlike this one, are not re-

viewable—either because they do not adjudicate rights or declare them legislatively, or because there are adequate administrative remedies which must be pursued before resorting to judicial remedies, or because there is no occasion to resort to equitable remedies. But we should not for that reason fail to discriminate between them and this case in which, because of its peculiar circumstances, all the elements prerequisite to judicial review are present. The ultimate test of reviewability is not to be found in an over-[fol. 484] refined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

We conclude that the Commission's promulgation of the regulations is an order reviewable under § 402(a) of the Act, and that the bill of complaint states a cause of action in equity. The stay now in effect will be continued, on terms to be settled by the court below.

Reversed.

Mr. Justice BLACK took no part in the consideration or decision of this case.

Order of May 3, 1941, as Amended October 11, 1941

Now, therefore, it is hereby ordered, That the following regulations be and they are hereby adopted:

SEC. 3.101. *Exclusive affiliation of station.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.

SEC. 3.102. *Territorial exclusivity.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serv-

ing a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call [fol. 485] in its primary service area upon the programs of the network organization.

SEC. 3.103. *Term of affiliation.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, expressed or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

SEC. 3.104. *Option time.*—No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8:00 a. m. Such options may not be exclusive as against other network organizations, and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

SEC. 3.105. *Right to reject programs.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

[fol. 486] SEC. 3.106. *Network ownership of stations.*—No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

SEC. 3.107. *Dual network operation.*—No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network; *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

SEC. 3.108. *Control by networks of station rates.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

[*Effective date.*] These regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941: *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; *And provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further exten- [fol. 487] sion of the effective date from time to time in order to permit the orderly disposition of properties.

The minute of October 31, 1941.

The Commission today adopted the following minute setting forth the procedure that it will follow in applying

the policies announced in the Chain Broadcasting Regulations:

If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106, relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations.

[fol. 488] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

No. 1026

COLUMBIA BROADCASTING SYSTEM, INC., Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.

Appeal from the District Court of the United States for the Southern District of New York

[June 1, 1942.]

Mr. Justice FRANKFURTER, dissenting.

The criteria governing judicial review of "orders" under the Urgent Deficiencies Act were defined by a unanimous Court in *United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309-10: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." If "broadcasting company" were substituted for "carrier", this analysis of the legal consequences of the action of the Interstate Commerce Commission in the *Los Angeles* case would fit perfectly the legal consequences of the action of the Federal Communications Commission in making public the challenged regulations.

[fol. 489] The fact that an action of an administrative agency occasions even irreparable loss does not in itself afford sufficient grounds for judicial review. Even if the Commission committed a wrong, the question of judicial reviewability still remains that put in the *Los Angeles* case, 273 U. S. at 313, to wit, is it "a wrong for which Congress provides a remedy under the Urgent Deficiencies Act" of October 22, 1913, 38 Stat. 208, 219, as incorporated in §402(a) of the Communications Act of 1934?

For Congress has not authorized resort to the federal courts merely because someone feels aggrieved, however

deeply, by an action of the Federal Communications Commission. A District Court of the United States can take a case only when Congress has authorized that type of case to be taken. Congress did not leave opportunity for reviewing damaging action by the Federal Communications Commission to the general equity powers of the district courts. It circumscribed the power of the courts in relation to the Commission in the most detailed way. Its incorporation by reference, in the Communications Act of 1934, of the scope of review allowed in reviewing an "order" of the Interstate Commerce Commission gave all the precise, definite, and technical boundaries which the concept of a reviewable "order" had acquired through the decisions of this Court prior to the enactment of the Communications Act. The precise requirements of an "order" of the Commission for purposes of judicial review are therefore as inflexible as though they were written into the Act itself.

Our problem, then, is this: Does the issuance of the chain broadcasting regulations constitute an "order" reviewable in a proceeding brought under §402(a) of the Communications Act, in the light of the settled rules for determining what such an "order" is when a determination of the Interstate Commerce Commission is made the basis of judicial review. It is therefore necessary to put out of mind what this case is not. It is not the invocation of equity jurisdiction in order to avoid threatened irreparable harm resulting from the criminal enforcement of [fol. 490] an unconstitutional statute, as in *Pierce* v. *Society of Sisters*, 268 U. S. 510. Nor do we have here a resort to equity because it is essential for the protection of asserted rights that criminal prosecutions unauthorized by law be restrained, as in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 183.

In promulgating these regulations the Communications Commission merely announced its conception of one aspect of the public interest, namely, the relationship of certain provisions in network-affiliation contracts to the obligation of a station licensee to render the most effective service to the listening public. The regulations themselves determine no rights. They alter the status of neither the networks nor licensees. As such they require nobody—neither the networks, the licensees, nor the Commission—to do anything. They are merely an announcement to the public of what the Commission intends to do in passing upon

future applications for station licenses. No action of the stations or the networks can violate the regulations, for there is nothing the regulations require them to do or refrain from doing.

Announcements of general policies intended to be followed by administrative agencies customarily take any one of various forms. Sometimes they are noted in the agency's annual report to Congress, sometimes in a public announcement or press release, and sometimes, as was the case here, they are published as "rules" or "regulations". See Final Report of the Attorney General's Committee on Administrative Procedure (1941), pp. 26-27. But whatever form such announcements may take, their nature and effect is the same. The reason why the Commission formulated its chain broadcasting policy in the form of a "regulation" is given in its report: "We believe that the announcement of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice. * * * Good administrative practice would seem to demand that such a statement of policy or rules and regulations be promulgated wherever sufficient infor- [fol. 491] mation is available upon which they may be based." Report on Chain Broadcasting, Federal Communications Commission, Order No. 37, Docket No. 5060, p. 85.

With respect to its jurisdiction over matters relating to radio broadcasting, the Communications Commission is essentially a licensing agency. Its regulatory power over the industry is derived, for the most part, from its authority to grant and withhold station licenses. Under §309 of the Communications Act of 1934 the Commission is required to examine each application for a station license and to determine in each case whether a grant would serve public interest, convenience, or necessity. As was noted in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138, the Act "expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." To that end Congress established an administrative procedure under which the Commission must make a specific determination in each case whether the public interest would be served by granting the particular application before it. No announcement of general licensing policy can relieve the Commission of its statutory obligation to examine each application for a license and

determine whether a grant or denial is required by the public interest.

The Commission recognized this fact in issuing these regulations. It explicitly stated that a determination of the requirements of the public interest will, in spite of the regulations, still have to be made in passing upon particular applications: "Announcements of policy may take the form of regulations or of general public statements. In either case, the applicant's right to a hearing on the question whether he does in fact propose to operate in the public interest is fully preserved. The regulations we are adopting are nothing more than the expression of the general policy we will follow in exercising our licensing power. The formulation of a regulation in general terms is an im- [fol. 492] portant aid to consistency and predictability and does not prejudice any rights of the applicant." Report on Chain Broadcasting, *supra*, p. 85.

Subsequent to the promulgation of the regulations, the Commission found that substantial modifications were necessary. In its supplemental report on these amendments the Commission gave further evidence of the flexible nature of the regulations: "The Commission stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances the chain broadcasting regulations should not be applicable to any particular situation." Moreover, in its Minute of October 31, 1941, designed primarily to protect the interests of station licensees who contest the validity of the regulations, the Commission again made it abundently clear that the regulations were not final: "If a station wishes to contest the validity of the Chain Broadcasting Regulations * * *, or the reasonablness of their application to the particular station, its license will be set for hearing."

The regulations do not, therefore, commit the Commission to any definitive course of action in passing upon applications for licenses. Consistently with the regulations (and, parenthetically, consistently with the authority of the Commission to depart from general regulations where such departure is in the public interest, see *Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 285), the Commission is

free to dilute them with amendments and exceptions. The construction of the regulations and their application to particular situations is still in the hands of the Commission. Administrative adjudication is still open. Before its completion it is not ripe for judicial review.

The characteristics of the administrative determinations in all the cases on which the Court's opinion relies were [fol. 493] wholly different. In each one the force of the law either through criminal prosecution or injunction or fine or some other judicial remedy could immediately be brought to bear to enforce the command of the administrative agency. In none of the cases was an administrative action held reviewable which in itself entailed no immediate legal consequences.

Thus, in the *Assigned Car Cases*, 274 U. S. 564, suit was brought under the Urgent Deficiencies Act to annul an order of the Interstate Commerce Commission prescribing for all railroads within its jurisdiction a rule governing distribution of cars for the transportation of bituminous coal. Under §402 of the Transportation Act of 1920, 41 Stat. 456, 476, 49 U. S. C. §1(12)(14), the carriers were required "to make just and reasonable distribution of cars", and the Commission was authorized to "establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad". Failure of a carrier to comply with such regulations issued by the Commission was declared unlawful, subjecting the carrier to a fine of $100 for each offense. Since the order of the Commission commanded carriers to take specified actions, and since the failure to comply with the order would bring immediate legal sanctions, the order was held reviewable.

Similarly, in *United States* v. *B. & O. R. Co.*, 293 U. S. 454, the Interstate Commerce Commission required railroads subject to its jurisdiction to equip locomotives with a suitable type of power-operated reverse gear. The Boiler Inspection Act, 36 Stat. 913, 916, expressly provided that violation by a carrier of any rule or regulation issued by the Commission under the Act was punishable by a fine recoverable in a civil action. A suit under the Urgent Deficiencies Act to set aside the Commission's order was therefore entertained.

A. T. & T. Co. v. *United States*, 299 U. S. 232, was a suit under §402(a) of the Communications Act of 1934, the same provision upon which jurisdiction of the present litigation

[fol. 494] is based, to set aside an order of the Federal Communications Commission prescribing a uniform system of accounts for telephone companies within the Act. Section 220(a) authorized the Commission to prescribe such forms of accounts, and §220(d) made the failure or refusal of a company to keep accounts in the manner prescribed by the Commission unlawful, punishable by a $500 forfeiture for each day of the continuance of the offense. Because of the legal sanctions immediately attaching upon its violation, the order was held reviewable.

In *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, the Commission, under the authority vested in it by §20 of the Interstate Commerce Act, issued orders prescribing forms of accounts, records, and memoranda and calling for annual reports of carriers by water. Section 20(7) made it unlawful for such carriers to keep any accounts other than those prescribed by the Commission. A suit to set aside the orders was therefore entertained. Similarly, in *Kansas City So. Ry.* v. *United States*, 231 U. S. 423, suit was brought to annul regulations of the Interstate Commerce Commission prescribing a uniform bookkeeping and accounting system for interstate railway carriers. Since carriers who failed to keep accounts as ordered by the regulations were subject to penalties under §20(7) of the Act, jurisdiction was taken. And in *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80, the Interstate Commerce Commission prescribed car-hire settlement rules governing use by common carriers of each other's cars. Violation of such rules by carriers was declared unlawful and subject to fines. Consequently, a suit to set aside the rules was entertained.

Of course, the mere fact that an administrative order determines a status does not mean that it is not reviewable. If an administrative determination of status has the effect of subjecting a person to legal obligations, whether embodied in statute or previously formulated administrative commands, or otherwise affecting legal rights, such a deter- [fol. 495] mination possesses the elements of a reviewable order. Thus, in *Rochester Tel. Corp. v. United States*, 307 U. S. 125, the Federal Communications Commission had issued orders requiring all telephone carriers subject to the Communications Act of 1934 to file schedules of their charges, copies of contracts with other carriers, etc. Section 203(c) of the Act provides that a carrier which fails or re-

fuses to comply with such rules of the Commission shall forfeit $500 for each offense, and $25 for each day of its continuance. After investigation and hearing, the Commission determined that the Rochester Telephone Corporation was a telephone carrier subject to the Act and therefore subject to the previously promulgated general orders directed to carriers within the Commission's jurisdiction. "The order of the Communications Commission in this case was therefore reviewable. It was not a mere abstract declaration of status of the Rochester under the Communications Act; nor was it a stage in an incomplete process of administrative adjudication. The contested order determining the status of the Rochester necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority. Into this class of carriers the order under dispute covered the Rochester, and by that fact, in conjunction with the other orders, made determination of the status of the Rochester a reviewable order of the Commission." *Rochester Tel. Corp.* v. *United States*, 307 U. S. at 143-44. Compare *A. F. of L.* v. *Labor Board*, 308 U. S. 401, 408. Unlike the action taken by the Federal Communications Commission in the *Rochester* case, its action here carried no directions of obedience of any kind to anyone.

It is said that the regulations derive legal effect through §312(a) giving the Commission authority to revoke licenses, and that "by virtue of the regulations alone", the networks and their affiliates are now subjected to legal detriment. But this is merely another way of phrasing the main contention that the regulations at once and without further [fol. 496] action by the Commission release legal sanctions. But the regulations have no such effect. To be sure, the Commission can revoke a station license "because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application". But the Commission may never require a licensee to file a statement of fact under §312(a); its provisions may therefore never come into operation. In any event, the regulations as such do not subject licensees to any sanctions. A license can be revoked under §312(a) because of the licensee's failure to operate its stations in the public interest, as required by the statute. The regulations adopted by the Commission cannot operate to revoke any

licenses. "It is only after a proceeding has been started (in which the licensee is entitled to a hearing during which the revocation order is suspended) and adversely concluded against a party that legal sanctions come into play—the Commission can bring proceedings to enforce its order of revocation and, correspondingly, the licensee can bring suit under §402(a) challenging the validity of the Commission's termination of the license.

Section 502 of the Communications Act provides that the violation of "any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act" shall be a criminal offense. Would the renewal by a licensee of its network-affiliation contract subject it to the criminal penalties imposed by § 502? Obviously not, for the regulations do not forbid a licensee from taking that or any other action. And, for the same reason, a license could not be revoked under the provision of § 312 (a) which authorizes revocation "for violation of or failure to observe • • • any regulation of the Commission authorized by this Act • • •" If the Commission had issued regulations which ordered licensees to do or refrain from doing something, the problem would be entirely different. Violation by a licensee of such a regulation would be grounds [fol. 497] for revocation of its license, under § 312(a), and for the imposition of criminal penalties, under § 502. And, the other requisites being present, such a regulation could be reviewed as a final administrative determination.

This leaves only the suggestion that since the action taken by the Commission, although not the completion of its adjudicatory process, nevertheless drastically affects substantial business interests, it is proper for the courts to intercede at this stage. Even if this argument were to be considered as if it had never before been made to and rejected by this Court, its infirmities are obvious. As a practical matter, the impact upon the business operations of the networks and their affiliated stations would probably be as disturbing as if the policies formulated in the regulations had been expressed through a press release, or if only the report, which is not only the foundation of the regulations but also embodies them, had been published with at the regulations which are only the summary of the report, or if Congress itself had incorporated these regulations into the text of the Communications Act. It will hardly be argued that any of these steps could be the sub-

ject of judicial review before the Commission acted upon particular applications. But assume that the greater formality given to the announcement of the Commission's statement of policy through the regulations intensified the practical business consequences. Congress has not conferred upon the district courts jurisdiction over "practical business consequences". They can review action of administrative agencies only when there is an "order", and when Congress in § 402(a) made only an "order" of the Communications Commission reviewable, it incorporated the settled doctrine established by an unbroken series of decisions in this Court that the courts could review only a final determination by an agency whereby its process has been concluded.

This is not the first time that the federal courts have been urged to sit in judgment upon "practical business consequences" where the action to be reviewed did not repre- [fol. 498] sent the final stage of administrative adjudication. The arguments made in this case have been made in the past but heretofore have always been rejected by this Court. The classic formulation and application of the doctrine of finality as to orders under the Urgent Deficiencies Act was contained in *United States* v. *Los Angeles R. R.*, 273 U. S. 299. In view of the thoroughness of the argument at the bar, and the weightiness of the opinion, that case has ever since been regarded as furnishing the guideposts in this field of law. It should govern here.

Suit was brought there to annul and enjoin an order of the Interstate Commerce Commission determining the final valuation for rate-making purposes of the Los Angeles & Salt Lake Railroad Company which operated a thousand miles of railroad lines. The valuation fixed by the Commission was $45,200,000; the carrier claimed that if the Commission had employed proper standards of valuation, the figure would be $70,000,000, a difference of $24,800,000. At the time suit was brought approximately 250,000 miles of railroad lines throughout the country were undergoing valuation. The validity of the criteria employed by the Commission in the case of the Los Angeles & Salt Lake Railroad Company was therefore of enormous national significance. In the words of Commissioner Eastman, "This case deals with an issue of greater moment to the country than any that we have ever determined." 75 I. C. C. 523. These issues, involving practically every phase

of valuation law, were canvassed in an adversary proceeding before the Commission lasting nearly a year and a half, resulting in a report of one hundred and forty pages, and expressed in a formal "order" of ten pages. Counsel for the railroad company there, as do counsel for the broadcasting company here, relied upon the practical finality of the order as a basis for review: "As a practical matter, the Commission in any and all proceedings in which it has occasion to use this valuation will give it not *prima facie* but conclusive effect. In the valuation proceeding before the Commission [fol. 499] which resulted in this order petitioner introduced its evidence of the value of the properties and the proceeding resulted in a valuation greatly at variance with the evidence and contentions of petitioner. No greater effect will be given to evidence which petitioner may introduce in some future proceeding before the Commission in an attempt to overcome the *prima facie* effect accorded by the Act to this valuation order. Therefore, unless and until set aside and annulled, this valuation will stand as a continuing menace against petitioner, and may be repeatedly used to petitioner's prejudice in rate, division, consolidation, security-issue and recapture proceedings." Brief for Appellee, pp. 64-65.

The Court specifically referred to this argument of counsel: "One [argument in support of jurisdiction], is that since the Commission has by reason of errors of law and of judgment grossly undervalued the property, its report will, unless suppressed, injure the credit of the carrier with the public." Finding, however, that the order did not finally determine any legal rights, the Court refused review: "Its [the Commission's] conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction." 273 U. S. at 314-15.[1]

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[1] To the same effect is United States *v.* Illinois Cent. R. R. Co., 244 U. S. 82. There the Interstate Commerce Commission issued an order fixing the time and place for hearing complaints made by various coal companies seeking damages against railroads for failing to supply a sufficient number of coal cars for their shipping needs. The railroads brought suit under the Urgent Deficiencies Act to annul this order, alleging that unless the hearing were restrained, the

To argue that irreparable injury implies reviewability is in effect to contend that there must be a remedy because the plaintiff claims serious damage. But in these situations —in reviewing "orders" under the Urgent Deficiencies Act—federal courts can give a remedy only to enforce a [fol. 500] legal right, and a legal right cannot be derived merely by concluding that a particular claim of hardship should afford a remedy. While formally we may appear to be dealing with technicalities, behind these considerations lie deep issues of policy in the division of authority as between administrative agencies and courts in carrying out the constitutional will of Congress. The source of the misconception underlying the claim for equitable relief in this case is the assumption that this is merely an ordinary invocation of equity, as though it were a controversy between two litigants of which only the courts are or can be seized. What we are here concerned with is due regard for the proper distribution made by Congress of legal authority as between two law-enforcing agencies of government, the administrative and the judicial. See *United States* v. *Morgan*, 307 U. S. 183, 190-91; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.

This case illustrates anew the influence of a particular instance of felt hardship in derailing legal principles from customary tracks. But this is not an isolated case. If threatened damage through general pronouncement of policy for future administrative action, to equitable review apart from the rule that judicial review is premature because of want of administrative finality, the same basis of irreparable harm which is here equated to jurisdiction will bear rich litigious fruit in the case of "regulations" issued by the Securities and Exchange Commission which are damaging in their immediate repercussions to stock exchange and holding companies, or regulations announced by the Treasury for the guidance of taxpayers but which adversely affect business interests, or regulations by the Federal Power Commission, etc. Suppose, for example, that the Commissioner of Internal Revenue issues a ruling that

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railroads would be put to enormous expense and inconvenience. The Court held that the notice of hearing "had no characteristics of an order, affirmative or negative", and since it "was a mere incident in the proceeding", the suit could not be entertained. 244 U. S. at 89.

profits derived by radio stations from their network operations are subject to a tax deemed by them onerous and illegal. Could a network successfully bring a suit in equity prior to the imposition of such taxes to invalidate the ruling [fol. 501] on the ground that its practical consequence was the cancellation of or refusal to renew network affiliations? One had supposed that the answer was clearly no. But surely in principle the problem is essentially that of the cases before us.

A final consideration remains. We are not dealing with the reviewability of administrative orders *in vacuo*. The reviewability of an order of the Federal Communications Commission depends upon the statutory scheme of judicial review embodied in § 402 of the Communications Act of 1934. Therefore, even if the regulations could be deemed to possess the essential attributes of a reviewable order, it would not inevitably follow that the order is reviewable in the manner provided for by § 402(a) of the Act. The scope and historical background of the provisions for judicial review contained in the Communications Act of 1934 have too recently been canvassed, see *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, — U. S. —; *Federal Communications Commission* v. *Columbia Broadcasting System*, 311 U. S. 132; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, to require detailed consideration here. Briefly, the Act created two avenues by which orders of the Federal Communications Commission were open to review by the federal courts. Under § 402(a), incorporating the provisions of the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219, relating to judicial review of orders of the Interstate Commerce Commission, a suit to enforce, set aside, annul, or suspend, an order of the Federal Communications Commission may be brought in a specially constituted district court, with a right of direct appeal to this Court, only if the order does not fall within the exceptions enumerated by § 402(b), namely, orders granting or denying applications for station licenses or construction permits and for renewal or modification of licenses. Review of the orders comprehended within § 402(b) is available only through an appeal to the Court of Appeals for the [fol. 502] District of Columbia, with no right of direct appeal to this Court.

If the regulations do constitute an order, what kind of an order can it be? It must be in the nature of a blanket denial, operating *in futuro*, to be sure, of applications for renewal of station licenses. But the Act expressly precludes judicial review of orders denying renewal applications of licensees in any manner other than that prescribed by § 402(b), to wit, by an appeal to the Court of Appeals for the District of Columbia. As the court below held, the effect of taking jurisdiction in these cases is to substitute a different court and a different procedure for those specified by Congress. This Court has not in the past displayed such an indifference to the particularities of legislation defining the jurisdiction of the lower federal courts. On the contrary, only last Term did the Court insist upon strict compliance with the statutory scheme for judicial review established by the Communications Act of 1934. See *Federal Communications Commission* v. *Columbia Broadcasting System*, 311 U. S. 132.

Even if we were free to disregard the scheme for judicial review which Congress has established, I could not agree that an appeal under § 402(b) would not be an adequate means for testing the claims made in the present litigation. There is essentially only one issue on the merits in this proceeding, namely, whether the adoption by the Commission of the policies expressed in the regulations transgresses its statutory and constitutional authority. But this issue could be raised and fully determined in an appeal under § 402(b) from an order denying a renewal application. Indeed, in its Minute of October 31, 1941, the Commission explicitly stated that the validity of the regulations could be put in issue in a renewal proceeding. If anything, therefore, the issues in an appeal under § 402(b) would be broader and not narrower than the issues here. Moreover, since the reasonableness of the application of the regulations to the particular situation would also be in issue in the [fol. 503] renewal proceeding, the reviewing court would have before it a record containing elements of concreteness and particularity not present in the record now before us.

The Commission's Minute enables a licensee to contest the validity of the regulations, or the reasonableness of applying them to the particular case, without fear of losing its license. "In order to insure that the station may remain on the air and be in no way injured by any such Commission

proceeding [contesting the validity of the regulations] and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision."

Plainly, therefore, a licensee is under no compulsion to cancel or modify its affiliation contract. Licensees who regard the regulations as invalid are free to continue their existing contracts and at the same time challenge the regulations in the orderly manner provided by the Act—and without any danger of losing their right to continue broadcasting. Similarly, the interests of the networks may be protected through intervention in renewal proceedings. Under the Commission's procedure, Rule 1.102 of the Rules of Practice and Procedure, where a renewal application is designated for hearing because of the licensee's contractual arrangements with others, the latter are customarily permitted to intervene. See, for example, Application of E. J. Regan and F. Arthur Bostwick, Docket No. 5788; Application of John H. Stenger, Jr., Docket No. 5430; Application of Ocala Broadcasting Co., Docket No. 6000; Application of Panama City Broadcasting Co., Docket No. 6001.

[fol. 504] We need go no farther than this litigation to perceive the unfortunate effects of premature judicial review. The chain broadcasting regulations were issued on May 2, 1941, more than a year ago. They were adopted by the Commission as a consequence of its finding, after an investigation lasting more than three years, that certain features of network-affiliation contracts prevented licensees from effectively discharging their obligation to render the fullest service to the listening public. The policy formulated by the Commission may or may not be wise—that is not our concern. But we cannot blink the fact that this litigation has for more than a year prevented the Commission from testing by experience the practical wisdom of a policy found by it to be required by the public interest. The com-

mencement of a proceeding under § 402(b) would not have presented the jurisdictional problems present in this proceeding. Surely those desirous of a speedy adjudication of the issue of the validity of the regulations were aware that the commencement of a proceeding under § 402(a) would not produce a prompt adjudication on the merits, but that it would instead result in postponing for a considerable period the effective date of the regulations, with all the contingent advantages afforded by such postponement.

Hardship there may well come through action of an administrative agency. But to slide from recognition of a hardship to assertion of jurisdiction is once more to assume that only the courts are the guardians of the rights and liberties of the people. In denying that it had power to review the action of the Federal Communications Commission because that body had not yet determined a legal right, the court below, as Judge Learned Hand's opinion abundantly proves, was not respecting a rule of etiquette. On the contrary, it merely recognized that the federal courts are entrusted with the correction of administrative errors or wrongdoing only to the extent of Congressional authorization. To say that the courts should reject the doctrine of administrative finality and take jurisdiction whenever [fol. 505] action of an administrative agency may seriously affect substantial business interests, regardless of how intermediate or incomplete the action may be, is, in effect, to imply that the protection of legal interests is entrusted solely to the courts. The unbroken current of this Court's decisions in construing the scope of judicial review under the Urgent Deficiencies Act, and which is the only warrant for jurisdiction in this case, repels such a contention. The decision should therefore be affirmed.

Mr. Justice Reed and Mr. Justice Douglas join in this dissent.

[fol. 506] In District Court of the United States for the Southern District of New York

[Title omitted]

Petition to Expedite Reargument on Defendants' Motions for Summary Judgment

Now come the defendants United States of America and the Federal Communications Commission, and pray[1] the Court to reconsider its action of June 18, 1942, postponing further proceedings in these cases until October 8, 1942, and to schedule further argument on the defendants' motions for summary judgment on July 7, 1942, or on such other date during the first two weeks of July as may be convenient.

The principal ground of this petition is that the Court's action of June 18, 1942 is not consistent with the statutory requirement that cases under the Urgent Deficiencies Act "shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day".

[fol. 507] In support of this petition the defendants respectfully show the Court:

(1) These suits were filed on October 31, 1941 and on February 21, 1942 this Court dismissed the complaints for lack of jurisdiction.

(2) When the plaintiffs indicated their intention to appeal to the Supreme Court, all parties cooperated in expediting the appeals so that they could be heard prior to

[1] This prayer is made by petition rather than motion since it can appropriately be considered and acted on without oral argument or convocation of the Court. The plaintiffs in these cases made no formal motion for reargument on the defendants' motion for summary judgment, nor is the Court's action of June 18, 1942 setting the reargument for October 8 and 9, 1942 embodied in an order. As was stated to the Court on June 18, counsel for the plaintiffs agreed (subject, of course, to the Court's direction) that reargument of the motions for summary judgment should be held on June 30, 1942 or some other proximate date which would meet the Court's convenience.

the end of the October, 1941 Term. Seven days after entry of the orders allowing the appeals, the records were filed in the Supreme Court. On March 16, 1942, the Supreme Court entered an order noting its jurisdiction. The appellants' briefs were filed April 13, 1942 and the Government's brief was filed on April 27, 1942. Oral argument began on April 30, 1942 and was concluded on May 1, 1942.

(3) On June 1, 1942, the Supreme Court reversed the order of this Court. Under Rule 34 of the Supreme Court, the mandate would not have been returned to this Court until after the expiration of twenty-five days from the Court's decision. In order that the proceedings could go forward expeditiously, the parties stipulated that the mandate could issue forthwith.

(4) On June 8, 1942, the day the Supreme Court returned the mandate, counsel for the Government telephoned counsel for the plaintiff in No. 16-179 and offered to rest its motion for summary judgment on the argument held in January, without further argument. Two days later counsel for the plaintiff in No. 16-179 informed counsel for the Government that the plaintiffs in both cases wanted further argument and might wish to file additional briefs, but agreed that the reargument should be held at this term of Court. It was stated that counsel for the plaintiffs did not desire a full reargument but would limit themselves to contending further that the case should not be disposed of on the motion for summary judgment, but only after a *trial de novo* and the taking of evidence before the full Court. On June 16 counsel for the plaintiff in No. 16-179 informed counsel [fol. 508] for the Government that the plaintiffs in both cases had selected June 30th as the date for reargument, and would request the Court to convene on that date.

(5) On June 18, 1942, this Court met and considered the parties' request for hearing on June 30. It determined that further proceedings should be postponed until October 8, 1942.

(6) The Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 220, 28 U. S. C. sec. 47, which is expressly made applicable to suits to enjoin the enforcement of orders of the Federal Communications Commission (Communications Act of 1934, 48 Stat. 926, 47 U. S. C. sec. 402(a)), provides in part as follows:

"The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day * * *; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition * * * shall apply."

The Supreme Court has said that one extraordinary feature of cases arising under the Urgent Deficiencies Act is that:

"Upon both the trial court and the Supreme Court rests the obligation to give the case precedence over others.

* * * * * * *

"In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof. In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays ordinarily incident to litigation." (*United States* v. *Griffin*, 303 U. S. 226, 232-233.)

See also, *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 14; *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317, 320-321; and *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 545.

[fol. 509] (7) It is believed that to postpone further proceedings in this case until October 8, 1942, would be to nullify the expediting provisions of the Urgent Deficiencies Act. We, of course, appreciate the fact that the dockets of the members of this Court are crowded and that some cases must, therefore, give way to others. However, it is submitted that it is the plain mandate of Congress that cases under the Urgent Deficiencies Act should be given precedence and heard forthwith.

(8) Holding this reargument at an early date will greatly expedite the final disposition of these cases. If the Court agrees with the Government's contention that no *trial de novo* is necessary, the cases will be available for final disposition without further hearing. If the Court determines that a trial should be held, the parties will be so informed

and can immediately commence to prepare for trial, before the Court or before a Special Master (*Borden's Farm Products Co.* v. *Ten Eyck*, 11 F. Supp. 599, aff'd. 297 U. S. 251). As the situation now stands, there will be a delay of over three months before the parties even learn whether or not there is to be a trial.

(9) The fact that the administrative proceedings before the Commission covered three years in no way affects the need for expedition of this litigation:

(a) It cannot seriously be argued that the Commission should have formulated its policies without careful study and due deliberation. In the nature of things, the careful formulation of important policies by an administrative body, in a field where a full understanding of the facts is essential, is time-consuming.

(b) At the hearing on June 18, 1942, counsel for the plaintiff in No. 16-179 stressed the lapse of time between the conclusion of the hearings before the Commission and the final promulgation of the rules here attacked.[2] Counsel for the plaintiffs were not, as was the Commission, confronted with the responsibility of comprehending and analyzing 8,713 pages of testimony and 707 exhibits, preparing [fol. 510] a comprehensive and accurate report, and carefully weighing the significance of the facts in order to develop a policy which would serve the public interest. It hardly lies in the mouth of counsel for the plaintiffs to attack the Commission's performance of these difficult functions as too deliberate, particularly since, as the Commission's records disclose, the date for filing briefs before the full Commission was twice postponed at the request of the plaintiffs in these cases.

(c) In any event, since the decision of the Supreme Court it is clear that these are cases under the Urgent Deficiencies Act, and Congress has declared and the Supreme Court has emphasized that such cases must be handled expeditiously. The situation in these cases is in no way unique; rate cases

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[2] For the convenience of the Court, a copy of the Stenographer's Minutes of the proceedings on June 18, 1942, is attached to this petition as Exhibit A. The remarks of counsel for the plaintiff referred to above appear at the top of page 412.

and other regulatory administrative proceedings frequently consume several years, and indeed the more important the case the more likely it is that the administrative proceedings will be lengthy. It is extraordinary to suggest that the mandate of the statute may be disregarded under such circumstances.

(10) Counsel for the plaintiffs have stated to counsel for the Government that the question on which they desire reargument is whether the cases can be decided on motions for summary judgment and the administrative record before the Commission, or whether a *trial de novo* should be held.[3] Counsel for the Government believe that, assuming a reasonable degree of restraint by counsel for all parties, this limited degree of reargument need not be very time-consuming.

(11) The opinion of the Supreme Court clearly contemplates that this Court shall determine after receipt of the mandate whether and on what terms the regulations should be stayed. The opinion concludes:

[fol. 511] "The stay now in effect will be continued on terms to be settled by the court below."

The Government regards this as continuing the stay until this Court takes further action, presumably by acting on plaintiffs' motions for preliminary injunction, which are now available for disposition. But it is respectfully urged that such disposition should be prompt, and that further argument on the motions, if any, should be had together with the reargument on the motions for summary judgment.

Under the Urgent Deficiencies Act, temporary stay orders issued by this Court are limited to sixty days. Accordingly, when this Court on March 2, 1942, allowed a temporary stay pending appeal, it limited it "until May 1st, 1942, or the argument of the appeal herein in the Supreme Court of the United States, whichever is earlier." By stipulation of the parties the stay was continued until the last decision day of the October, 1941, Term of the Supreme Court of the United States or until the determination of the pending appeals, whichever is earlier. Thus,

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[3] See the Stenographer's Minutes of the proceedings on June 18, pages 406, 407.

the stay which the Supreme Court continued is the stay originally granted by this Court on March 2, 1942, as extended by stipulation of the parties until the decision. In view of the statutory provision limiting to sixty days this Court's power to grant temporary stays, it seems highly improbable that the Supreme Court contemplated that the stay, which it continued "on terms to be settled by the court below", would, in the absence of further action by this Court, extend until October 8, 1942, a total of 130 days from the date of the Supreme Court's decision.

(12) As matters now stand, plaintiffs' request for reargument is delaying further proceedings in these cases for several months. In the meantime, the parties do not even know whether or not a *trial de novo* will be had. Wherefore, it is respectfully prayed that reargument be held at [fol. 512] the "earliest practicable day", giving precedence to this case as is required by the Urgent Deficiencies Act.

Respectfully submitted, United States of America, By Samuel Brodsky. Federal Communications Commission, By Telford Taylor, General Counsel. Charles R. Denny, Assistant General Counsel. Harry M. Plotkin, Counsel.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing "Petition to Expedite Reargument on Defendants' Motions for Summary Judgment" acknowledged and a true copy received thereof this 26th day of June, 1942:

—— ——, Solicitor for National Broadcasting Company, Inc. —— ——, Solicitor for Woodmen of the World Life Insurance Society. —— ——, Solicitor for Stromberg-Carlson Telephone Manufacturing Company. —— ——, Solicitor for Columbia Broadcasting System, Inc. Percy H. Russell, Jr., Solicitor for Mutual Broadcasting System, Inc.

[fols. 513-534] The following was endorsed on the "Petition to Expedite Reargument of Defendants' Motions for Summary Judgment":

"I am in favor of denying the petition.

John Bright, Henry W. Goddard."

6/30/42.

* * * * * * *

[fol. 535] In District Court of the United States for the Southern District of New York

[Title omitted]

Affidavit of Frank E. Mullen, Vice-President and General Manager of National Broadcasting Company, Inc.

United States of America
Southern District of New York
City, County and State of New York, ss:

Frank E. Mullen, being duly sworn, deposes and says:

I am Vice-President and General Manager of National Broadcasting Company, Inc. (hereinafter called NBC), one of the plaintiffs herein. This affidavit is submitted in support of plaintiffs' motion for temporary injunction and as a supplement to my affidavit of January 3, 1942, made in [fol. 536] opposition to defendants' motions to dismiss the complaint or, in the alternative, for summary judgment.

Copies of four letters received by NBC with respect to the Order and Regulations issued by the Federal Communications Commission, Docket No. 5060, after the Commission adopted its minute of October 31, are annexed hereto and marked Exhibits 1 to 4, inclusive.

They demonstrate that the minute did not operate to mitigate the damage to NBC described in my affidavit of January 3, 1942.

Frank E. Mullen.

Subscribed and sworn to before me this 31st day of August, 1942. William F. Kennedy, Notary Public, New York County.

[fol. 537] EXHIBIT 1 TO AFFIDAVIT

The Travelers

Broadcasting Service Corporation

WTIC

Hartford, Connecticut

Paul W. Morency, General Manager

November 4, 1941

Mr. William S. Hedges, Vice President
The National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, N. Y.

Dear Mr. Hedges:

The Travelers Broadcasting Service Corporation, operating Station WTIC, having noted the new regulations promulgated by the Federal Communications Commission which are to be effective November 15, 1941, hereby informs you of its intention to abide by those new regulations when effective. This will necessitate some changes in the current contract between the National Broadcasting Company and the Travelers Broadcasting Service Corporation.

If the new regulations become effective November 15, 1941 we will consider those parts of the contract void which conflict with the new regulations. It is our desire to continue our affiliation with the National Broadcasting Company under the terms allowed by the Federal Communications Commission.

Very truly yours (Signed) Paul W. Morency.

PWM.B

[fol. 538] EXHIBIT 2 TO AFFIDAVIT

WLEU . . .

Broadcasting Corporation

NBC Blue Network

Commerce Building Erie, Pennsylvania

November 12, 1941

Mr. William S. Hedges,
Vice President
National Broadcasting Company
New York, N. Y.

Dear Mr. Hedges:

In connection with the telegrams you have sent us and the new Network rulings issued by the Commission, that were supposed to be effective November 15th, which, if and when enforced by the F. C. C., will naturally alter the affiliation contract existing at present between the National Broadcasting Company and the WLEU Broadcasting Corporation.

We wish at this time to advise you that if and when this Commission ruling becomes effective, that WLEU will abide by such rulings and regulations of the Commission. The portions of our affiliation contract that conflict with any such rulings of the Commission, will be considered null and void by us on those effective dates as we wish to comply 100% with all F. C. C. rules and regulations as issued by this body on their effective dates.

Very truly yours, (Signed) V. Hamilton-Weir, Vice President.

VHW:CD

[fol. 539] EXHIBIT 3 TO AFFIDAVIT

KSOO
KELO

SIOUX FALLS BROADCAST ASSOCIATION, INC.

Sioux Falls, S. D.

Joseph Henkin, President and Manager

S. Fantle, Jr., Vice President-Treasurer

Morton Henkin, Vice President-Secretary

November 20, 1941

Mr. William S. Hedges
Vice-Pres. in Charge of Stations
National Broadcasting Co.
30 Rockefeller Plaza
New York City

DEAR MR. HEDGES:

We enclose herewith executed amendments sent us by you modifying in certain respects NBC contract "A" and NBC contract "B" for KSOO and the NBC contract for KELO.

We have been notified of the postponement by the Federal Communications Commission of the effective date of the regulations concerning chain broadcasting. Accordingly, we desire to postpone the cancellation date of our present contracts, and we will be very glad to continue our relations with you in the future on whatever basis is required of us as a licensee by the Federal Communications Commission.

Kindest regards.

Sincerely, (Signed) Mort Henkin.

MH:MB
Encs.

[fol. 540] EXHIBIT 4 TO AFFIDAVIT

February 10, 1942

National Broadcasting Company
RCA Building, Radio City
New York, N. Y.

Attention: Mr. Easton C. Woolley

DEAR MR. WOOLLEY:

With reference to the two attached agreements:

1. One of January 5th specifying an increased rate for Station WFAA, and

2. The letter of January 28th with reference to cut-in announcements.

This is to advise that these agreements have been accepted and can be in operation only so long as they do not offend the Federal Communications Commission's General Order in Docket 5060 which effective date has been indefinitely postponed by the Commission.

Very truly yours, (Signed) James M. Moreney, Vice President and Secretary A. H. Belo Corporation.

Att.

[fol. 541] IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

v.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Defendants

Civil 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Intervenors

Before: L. Hand, C.J., and Goddard and Bright, D.J.J.

On motions by the defendants for summary judgments dismissing the complaints herein in two actions to "annul" certain regulations of the Federal Communications Commission and to enjoin the Commission from enforcing them.

[fol. 542] Charles R. Denny for the Commission.

Charles E. Hughes, Jr., for the Columbia Broadcasting System, Inc.

John T. Cahill for the National Broadcasting Company, Inc.

OPINION—November 16, 1942

L. HAND, C.J.: These cases come before us a second time upon motions made by the defendants and the Mutual Broadcasting System—which has intervened—summarily to dismiss the complaints. The motions are made upon the complaints, upon certain affidavits of the counsel for the Commission, upon the Commission's report and all the proceedings and evidence before it, and—we shall assume—upon the affidavits filed by the plaintiffs on their motions for preliminary injunctions. We shall not repeat the out-

lines of the controversy as set forth in our opinion in 44 Fed. Suppl. 688, and in that of the Supreme Court which reversed our judgments dismissing the complaints, 316 U. S. 407; but shall proceed directly to consider the points raised.

The most important of these is whether the Commission had power to pass the challenged regulations. Everyone agrees that in granting licenses under §309 of Title 47, U. S. Code, it must distribute the available wave-lengths so as to give greatest possible service, and that it must see to it that all applicants have the necessary technical ability to broadcast programs, that the stations are properly constructed and properly manned and do not interfere with other stations, and that the licensees are responsible, morally and financially. All these things and perhaps more, the Commission may regulate in discharge of its duty to promote the "public convenience, interest, or necessity." The regulations at bar have, however, nothing to do with these qualifications of a licensee; they are addressed, not to his ability to broadcast any programs which he may accept, but to his freedom to procure other programs than those to which by contract with, or by the control of, the "networks" he is limited; they touch, not how he shall [fol. 543] broadcast, but how unrestricted he shall be in doing so. The plaintiffs say that, judged both by its history and by its language, the Act gave the Commission power to consider only the qualifications first specified, leaving outside any administrative control all arrangements by which a station secures its programs. They say that, although it is true that §313 makes "all laws * * * relating to unlawful restraints * * * applicable to * * * interstate or foreign radio communications," and that the courts have jurisdiction in this way to annul monopolies or restrictive contracts which affect broadcasting, only courts may do so; the Commission must disregard any such considerations when deciding whether to grant or refuse a license.

Section 303 defines the Commission's powers; its original was §4 of the Radio Act of 1927 which had eleven subdivisions, of which the first ten were the same as the first eleven of §303 except for a new subdivision ("g") introduced into §303. The eighth subdivision ("h") of §4 of the Radio Act (now the ninth ("i") of §303) gave the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting;" and on

it the Commission particularly relied. The plaintiffs answer that it was meant merely to give the Commission control over the power and wave-lengths used by stations while connected with "networks" for "chain broadcasting." It was introduced by an amendment in the Senate and originally read that the Commission should have power, "when stations are connected by wire for chain broadcasting," to "determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting." The first clause of this amendment was indeed limited as the plaintiffs say; but the same was not true of the second clause. "Equitable radio service to the listeners" was a comprehensive phrase, read most naturally, it should include the best possible service compatible with such burdens at it was reasonable to impose upon the [fol. 544] "networks" and their "affiliates"—"equitable," that is, in the sense that the interest of both sides were to be weighed. The fact that the occasion for the amendment appears to have been the Senate's apprehension that the "networks" might drown out "unaffiliated" stations, by no means circumscribed the scope of these words. This amendment finally emerged from Conference and was enacted, in the broad terms we have quoted; it would be altogether unwarranted to assume that it was intended to adopt the limited clause and to abandon the general one. We may start therefore with the strong probability that even in the Radio Act of 1927 the Commission had power by virtue of this subdivision to regulate "chain broadcasting" generally in the interest of "listeners."

The amendment to §303 of the Communications Act of 1934, that is, the interpolation of subdivision "g," confirms this interpretation. That subdivision reads as follows: "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." We can see no reason for confining the last clause to scientific or engineering problems; the purpose is apparent to give the Commission power to foster the industry in all appropriate ways. It is not clear that this was a new purpose; but if it was, it infused the powers already granted in the earlier act, broadening them in accord with the changed outlook—

the power granted under subdivision "i" among the rest. The duty—for the power imposed a corresponding duty—to "encourage" the "larger" use of radio incidentally presupposed a power to prevent the frustration of the purpose so disclosed; we are not to construe the section as at war with itself. Therefore, even if §303 stood alone, we should hold that subdivision "i" granted power to the Commission to consider the effect upon a station's choice of programs of any controls or restrictions exercised by the "networks."

However, §303 does not stand alone. In addition to providing that all laws "relating to unlawful restraints and monopolies and to combinations, contracts, or agreements [fol. 545] in restraint of trade" should apply to "radio communications," §313 also took over from §15 of the Act of 1927 the provision that in actions brought under those laws or in proceedings to enforce orders of the Federal Trade Commission, whenever "any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may * * * decree that the license of such licensee shall * * * be revoked." As will be observed, revocation was here made a penalty like other penalties for monopoly or restraint of trade; the courts were not to use it as a means of compelling a licensee to furnish service free from unlawful restrictions, but to punish him for his past misconduct, the discretion accorded them being exercised according to the degree of his "guilt." This was in harmony with the general scheme, for a court is not in good position to know how far a monopolistic or unfair competitive practice may interfere with "the larger and more effective use of radio in the public interest;" if any official was competent to do so, it was the Commission. Section 13 of the Radio Act of 1927 had provided that if a court revoked a license, the Commission must refuse to renew it, but it had stopped there; and, as the law then stood, it might perhaps have been argued with some show of plausibility that an applicant's monopolistic or unfair competitive practices in the past were not relevant to the grant of a license.

However that may have been, § 13 was amended in 1934 by adding a new clause, and the resultant § 311, in addition to retaining the old language forbidding the restoration of a forfeited license, contained a new one providing that the

Commission is "authorized to refuse such station license" whenever the applicant had been "finally adjudged guilty" by a "Federal court of * * * attempting unlawfully to monopolize radio communication * * * or to have been using unfair methods of competition." That power was certainly not to be used as a punishment; the Commission was not to overrule the court which had decided not to impose the penalty. Such a power would have been open [fol. 546] to serious constitutional objection. What use then was the Commission to make of an adjudication of the applicant's "guilt"? Only, we submit, by considering it as evidence that, if granted a license, he would not use it for the "public convenience, interest, or necessity," i.e. that the grant of a license would not "encourage the larger and more effective use of radio in the public interest." The necessary implication from this was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee. Thus, whatever may have been the limits of the Commission's earlier powers, manifestly after 1934 they included a consideration of how far licensees might be improperly restricted in the exploitation of their licenses.

The plaintiffs do not concede even this, as we understand it, but in any event they insist that the exercise of any such power was conditioned upon an earlier adjudication by some court. We can see no reason to suppose (although apparently the Commission does not agree) that an applicant's violation of the statutes against monopoly and unfair competition, as such and alone, ever disentitles him to a license. It is indeed evidence relevant to his fitness for the reasons we have just given; but it is such only as any past conduct may be an earnest of what is to be expected in the future, and because a repetition would be prejudicial to the public interest. We construe this clause of § 311 as going no further than to provide the Commission with an estoppel as to any facts which a court may have found; these may be taken as data for any rational inference that can be drawn from them relevant to the ultimate issue; but "guilt" as "guilt" is not the ultimate issue. Certainly that is the only effect which it is necessary to give the clause; there is not the slightest warrant for inferring that in the absence of an adjudication, the Com-

mission may not determine what has been an applicant's past conduct, or may not consider how far, if repeated, it [fol. 547] would interfere with the fullest use of his license. Whatever may be the mysteries enveloping an adjudication of "guilt" under the Anti-Trust laws which make that issue unfit to be entrusted as such to profane hands, the Commission is certainly peculiarly competent to appraise the effect upon broadcasting of restrictive or monopolistic practices, and is as competent to decide whether an applicant is likely to engage in them as it is to decide any of the other issues which come before it. The decision in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, is irrelevant; the only question decided was whether the injury suffered by an existing station was a material factor in licensing a new station.

The plaintiffs next challenge the regulations because they lay down general conditions for the grant of licenses instead of reserving decision until the issues arise upon an application. Such a doctrine would go far to destroy the power to make any regulations at all; nor can we see the advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future. It may perhaps be true that a party, who had no notice of the hearings before the Commission and no opportunity to present his side, would be entitled, when applying for a license, to a reconsideration of those findings upon which the regulations rested. None of the plaintiffs at bar are in that position; they were amply advised of what the Commission proposed; they were invited to attend; all but the co-plaintiff "affiliates" of the National Broadcasting Company did so, put in whatever evidence they wished and were heard before the original regulations were passed, and again at the rehearing. They at any rate were accorded all the privileges they would have had if they had intervened in an application for a license. It would be futile after the expenditure of so much time and labor to hold that the proceedings were only advisory and concluded nobody; indeed, the mere fact that the regulations are "orders" reviewable under § 402(a) would seem to preclude such a conclusion. We do not understand the [fol. 548] Supreme Court to mean that every minatory gesture of the Commission is reviewable under that section.

The next objection is that the Commission did not really find that the forbidden practices worked against "the pub-

lic convenience, interest, or necessity," but that it rested upon its supposed duty to deny the applications of all who proposed to use their licenses in violation of the Anti-Trust laws. The Commission in one passage of its report does indeed seem so to have understood the statute, though it would scarcely be fair to say that it held as much; but, be that as it may, it did not base its action upon that theory. It made specific findings in the case of each regulation that the contract or the control which it forbade was against the public interest because it took away the stations' free choice without any corresponding advantage to the industry as a whole. Each regulation was a specific exercise of power, addressed to a particular practice which interfered with the most "effective use of radio in the public interest."

The only constitutional objections which we need consider are two: that the standard set by § 303 ("public convenience, interest, or necessity") is too vague; and that the regulations invade the privilege of free speech. Although the Supreme Court has twice at least upheld the standard when applied to the construction of stations or to the allocation of wave lengths (*Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, 138; (semble) *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428), the plaintiffs insist that it will not serve if used to regulate the business arrangements of a station. We are assuming that when so used it demands the widest practicable variety in the choice of programs available for broadcasting; that system which will most stimulate and liberate the ingenuity of those who purvey them to the public. There can be no doubt that, if the introductory clause of § 303 will bear that construction the test is definite enough—and indeed peculiarly adapted to the putative proficiency of the Commission in its field. Nor can we see why, when applied to [fol. 549] the issue of the licensee's freedom from restraint, the test is not a fair gloss to be imposed upon the clause. It is impossible in a single rubric to specify all the occasions to which it will apply, and the effort at specification is usually abortive for they cannot all be foreshadowed. It is enough if the delegated power be so defined that a clue can be found in it for dealing with the several occasions which may arise. That seems to us to be the situation here.

The argument drawn from the First Amendment, as we understand it, is this. It is true that the regulations do not profess directly to control what programs the stations may broadcast; but they do so indirectly. They do this by forbidding them to make the forbidden contracts with "networks" even though they believe that these will bring them better programs than they can get in any other way; and it is not necessary for a law directly to control the substance of an utterance for it to invade the right of free speech. We agree that the regulations might be invalid though they do not prohibit programs on the basis of their contents; they do fetter the choice of the stations; absolutely free choice would include the privilege of deciding that they preferred the opportunities open to them under the "networks'" contracts to those which would be otherwise available. The Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i.e. the interests, first, of the "listeners," next, of any licensees who may prefer to be freer of the "networks" than they are, and last, of any future competing "networks." Whether or not the conflict between these interests and those of the "networks" and their "affiliates" has been properly composed, no question of free speech can arise.

The last question upon the merits is whether the Commission's findings are so plainly without support in the [fol. 550] evidence as to be "arbitrary or capricious," §402(e); that is, whether the regulations are certain not to promote the "public convenience, interest, or necessity." A majority of the Commission, after a long and painstaking investigation, has concluded that the net result will be to give a larger choice to stations without sensibly diminishing the services of "chain broadcasting," which the report highly commended. We are asked to say that there is no reasonable basis for such a conclusion; to say that no reasonable person could find in the evidence any support for it. The industry at large holds conflicting views; the plaintiffs on the one hand believe that the prohibitions will

in the end destroy "chain broadcasting" altogether; the Mutual Broadcasting System and a number of other interested persons think otherwise. Each side has stated its reasons and the Commission has chosen. It was created to make such choices because Congress believed that it would acquire in its special sphere a skill which courts could not match; and it is now hornbook law that the conclusions of such tribunals are not to be disturbed except in the plainest case. That doctrine applies here with especial force just because the findings are necessarily prospective; time alone can decide their success or their failure. The measure of our power is to say whether there was any substantial evidence that the added freedom given to stations will outweigh the reduction in the opportunities which will remain open to the "networks." We cannot say that there was no such evidence. To take the regulation which is the head and front of the Commission's offending—3.104—it indeed does limit the power of a "network" to furnish large advertisers with the time of all its "affiliates," for it must always run the risk that after its last inquiry a station may have "sold" to another "network" the time which it proposed to "buy" of that station. On the other hand, it is certainly possible that the present contracts give the "networks" so strong a hold upon the industry as to keep down competition which would prove beneficial. Upon such an issue nobody who is not steeped in the details of the business is really entitled to an opinion, and indeed even the opinions of those who are so steeped must be largely spec-
[fol. 551] ulation. But that does not mean that the industry must be left to itself; the Commission was created precisely to say how far it was best to let things stand, and how far to intervene.

There remains only the question of procedure: whether a motion for summary judgment is proper, or whether, as the plaintiffs argue, the causes should go to trial and be heard upon evidence taken *de novo*. That depends upon what effect we should give to the Commission's findings. If the plaintiffs intervened in a proceeding by one of their "affiliates" for the renewal of a license, they could not compel the Commission to reconsider the findings of the report. As we have said, they had had adequate notice and full opportunity to be heard; indeed neither of the complaints alleges that they had not. Upon appeal to the Court of Appeals of the District of Columbia under §402(b), the

whole record before the Commission upon the hearings which resulted in the regulations would be part of the record, and the only issues open would be whether there was substantial support for the findings in the record, and whether the findings were "arbitrary or capricious," §402(e). That record and those issues are before us here. The plaintiffs did not choose to wait and intervene, but adopted the alternative of an action in equity to "set aside" and "annul" the regulations as "orders." The reason that they have been allowed to proceed in this way is that the regulations inflicted a present injury upon them from which they were entitled to present relief; but the determining issues in each case are the same. Congress, having meant the validity of an order refusing a license to be determined as an appeal upon the record made before the Commission, cannot have meant to allow a larger scope of review because the Commission threatens for the same reasons to refuse all licenses.

This is confirmed by considering what use we could make of any evidence if we took it. It might go to show that the Commission had failed to give adequate notice to the plaintiff of what it proposed, or an adequate opportunity to put in their own evidence, or an adequate hearing upon all the [fol. 552] evidence; but aside from the fact that the record is before us and does not bear out such a contention, neither complaint, as we have just said, alleges anything of the kind. On the other hand, if the evidence went to contradict or overthrow the findings, we could not bring it into hotchpot with the evidence taken by the Commission, without deciding the issues in the first instance ourselves. We have no such power; it would upset the whole underlying scheme of an expert commission, whose orders must stand or fall upon such evidence as it had before it. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426. If an aggrieved party wishes to supplement that evidence he must apply to the Commission itself, §405.

The plaintiffs somewhat faintly invoke the doctrine of *Crowell* v. *Benson*, 285 U. S. 22, *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U. S. 349, and *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38. Assuming that that doctrine is still law (*Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573; S. C. 311 U. S. 570), it does not apply. The "networks" are indubitably engaged in interstate commerce and so are their "affiliates;"

it is a question of law, not of fact, whether the regulations are within the Commission's powers, and the only issue of fact, assuming it can be called such, is whether there was evidence to support the findings. Unless the distinction between what is jurisdictional and what goes to the exercise of a power is to disappear altogether, the Commission's jurisdiction did not depend upon whether they rightly estimated the "public convenience, interest, or necessity."

The complaints will be dismissed; and as there has been no trial, we need make no findings. As before, we will grant a stay, this time until February 1, 1943, or until the argument of the appeal in the Supreme Court, whichever is earlier. The same findings which we then made will serve with slight verbal changes. We are filing the judgments, the stays and findings along with this opinion.

Complaints dismissed.

[fol. 553] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 16—178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Defendants

ORDER DISMISSING COMPLAINT—November 16, 1942

Before: L. Hand, C. J., and Goddard and Bright, D. JJ.

This cause came on to be heard at the October, 1942 term of this court and was argued by counsel; and thereupon, and upon consideration thereof, it is

Ordered, Adjudged and Decreed that the complaint herein be, and the same hereby is, dismissed on the merits.

Learned Hand, Circuit Judge. Henry W. Goddard, District Judge. John Bright, District Judge.

[fol. 554] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

FINDINGS OF FACT

I. That if the Federal Communications Commission, pending the plaintiffs' appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; the plaintiffs will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two and one-half months or until the appeal can be argued, which-
[fol. 555] ever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to the plaintiffs arising from enforcement, if the conditions mentioned in the First Finding exist.

That the plaintiffs are entitled to a stay pending their appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of February, 1943, whichever is earlier.

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

[fol. 556] IN UNITED STATES DISTRICT COURT

DECREE GRANTING TEMPORARY RESTRAINING ORDER

This cause came on to be further heard at the October, 1942, term of this court and was argued by counsel and thereupon, upon consideration thereof, it appearing that the relief herein granted is necessary to preserve the *status*

quo pending an appeal by the plaintiffs to the Supreme Court, for the reasons appearing in the Findings of Fact filed herewith, it is

Ordered, Adjudged and Decreed that until February 1, 1943, or the argument of the appeal herein in the Supreme Court of the United States, whichever is earlier, the Federal Communications Commission be and the same hereby is restrained from enforcing those regulations which were issued in their amended form on October 11, 1941, and which are known as "Order in Docket No. 5060."

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

[fol. 557] In United States District Court, Southern District of New York

[Title omitted]

Petition for a Direct Appeal to the Supreme Court of the United States

To the Hon. Learned Hand, Circuit Judge for the Second Circuit; the Hon. Henry W. Goddard, District Judge for the Southern District of New York; the Hon. John Bright, District Judge for the said District:

Now come National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, plaintiffs herein, and feeling themselves aggrieved by the final order or decree of the District Court rendered and entered in the above-entitled cause on the 16th day of November, 1942, do hereby appeal therefrom to the Supreme Court of the United States because of errors prejudicial to plaintiffs which are set forth in the assignment of errors presented and filed herewith, and pray that their appeal be allowed and that citation be issued as provided by law and that the record on appeal be made and certified and sent to the [fol. 558] Supreme Court of the United States, in accordance with the rules of that Court.

And your petitioners further pray that an order be made fixing the amount of security which your petitioners shall give and furnish upon such appeal.

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

[fol. 559] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

Come now National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, plaintiffs in the above-entitled cause, and file the following assignment of errors upon which they shall rely in the prosecution of the appeal to the Supreme Court of the United States herein petitioned for in said cause from the order, judgment and decree of the statutory three-judge District Court of the United States for the Southern District of New York entered on the 16th day of November, 1942.

1. The Court erred in dismissing appellants' complaint on the merits.

2. The Court erred in failing to issue the injunction prayed for by appellants.

3. The Court erred in holding that the Federal Communications Commission has the power to promulgate the Order sought to be set aside in this suit.

[fol. 560] 4. The Court erred in failing to hold, as it should have done, that the Federal Communications Commission has no power to promulgate the Order sought to be set aside in this suit.

5. The Court erred in placing a construction upon the Federal Communications Act of 1934 repugnant to Section 326 of said Act, to the First Amendment to the Constitution

of the United States and to Article I, Section 1 of the Constitution of the United States, in order to support the Order.

6. The Court erred in failing to hold that the Order bears no reasonable relation to the standard of public interest, convenience and necessity adopted by the Communications Act of 1934 and is arbitrary and capricious.

7. The Court erred in holding that the Order is not so plainly without support in the evidence taken before the Commission as to be arbitrary and capricious.

8. The Court erred in dismissing the complaint without holding a trial before it to determine the reasonableness of the relation of the Order to the standard of public interest, convenience and necessity adopted by the Communications Act of 1934.

Wherefore, petitioners pray that the final order or decree entered herein on the 16th day of November, 1942, be reversed and that such other and further relief be granted as to the Court may seem just and proper.

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

[fol. 561] In United States District Court, Southern District of New York

[Title omitted]

Order Allowing Appeal

The plaintiffs herein having filed a petition for appeal to the Supreme Court of the United States from the decree entered herein on November 16, 1942, and having filed their assignment of errors, it is

Ordered, that an appeal by petitioners in the above-entitled cause to the Supreme Court of the United States from the decree heretofore filed, and entered herein on November 16, 1942, be and the same is hereby allowed and that the record on appeal be made and certified and sent to

the Supreme Court o fthe United States in accordance with the rules of that Court, said appeal being hereby made returnable forty (40) days from the date hereof;

Ordered Further, that bond on appeal, to be approved by this Court, is fixed at the sum of $750.

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

[fol. 562] In United States District Court, Southern District of New York

[Title omitted]

Notice of Appeal

To the Hon. John J. Bennett, Jr., Attorney General of the State of New York; Samuel Brodsky, Esq., Special Assistant to the Attorney General, Attorney for the United States; Charles R. Denny, General Counsel for the Federal Communications Commission, and Leon Lauterstein, Attorney for Mutual Broadcasting System, Inc.:

Pursuant to the Urgent Deficiencies Appropriation Act of October 22, 1913, Chap. 32, 38 Stat. 219, 220, you are hereby notified that National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, the above-named petitioners, have taken an appeal to the Supreme Court of the United States from the final decree of the specially constituted United States District Court entered herein November 16, 1942, dismissing on the merits the complaint of said petitioners praying that a certain [fol. 563] order of the Federal Communications Commission designated "Commission Order in Docket No. 5060, In the Matter of the Investigation of Chain Broadcasting," promulgating certain regulations relating to radio stations and network organizations engaged in chain broadcasting, entered May 2, 1941, and amended October 11, 1941, be enjoined, set aside and annulled; and the order allowing the said appeal makes the same returnable in the Supreme

Court of the United States forty (40) days from the date hereof.

Dated at New York, New York, this — day of November, 1942.

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

[fol. 564] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL

To the Solicitor General of the United States, Solicitor for the United States:

Pursuant to the Urgent Deficiencies Appropriation Act of October 22, 1913, Chap. 32, 38 Stat. 219, 220, you are hereby notified that National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, the above-named petitioners, have taken an appeal to the Supreme Court of the United States from the final decree of the specially constituted United States District Court entered herein November 16, 1942, dismissing on the merits the complaint of said petitioners praying that a certain order of the Federal Communications Commission designated "Commission Order in Docket No. 5060, In the Matter of the Investigation of Chain Broadcasting," promul-
[fol. 565] gating certain regulations relating to radio stations and network organizations engaged in chain broadcasting, entered May 2, 1941, and amended October 11, 1941, be enjoined, set aside and annulled; and the order allowing the said appeal makes the same returnable in the Supreme Court of the United States forty (40) days from the date hereof.

Dated at New York, New York, this — day of November, 1942.

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

[fols. 566-568] Bond on appeal for $750.00, approved Nov. 25, 1942, omitted in printing.

[fols. 569-571] Citation, in usual form, omitted in printing.

[fol. 572] In United States District Court, Southern District of New York

[Title omitted]

Direction re Transmission of Original Documents

It Is Hereby Directed that the original of Exhibit A to the affidavit of Telford Taylor, of November 5, 1941, be [fol. 573] transmitted to the Supreme Court.

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

Agreed to: John T. Cahill, Thomas H. Middleton, David M. Wood, Samuel Brodsky, Spl. Asst. to Atty. Gen.; Charles R. Denny, Gen. Counsel, F. C. C., Leon Lauterstein, John Burns.

[fol. 574] In United States District Court Southern District of New York

[Title omitted]

Praecipe for Transcript of Record

To the Clerk of the United States District Court for the Southern Distict of New York:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above-entitled cause and

to include in such transcript of record the following, and no other papers and exhibits, to-wit:

1. Plaintiffs' complaint and Exhibits A through F, inclusive, thereto attached.

2. Plaintiffs' notice of motion and motion for preliminary injunction and for temporary restraining order, together with the supporting affidavits of Niles Trammell (including Exhibits I through III, inclusive, attached thereto), John J. Gillen, Jr. and Edward A. Hanover, annexed thereto.

3. Defendants' motions to dismiss the complaint or, in the alternative, for summary judgment together with the affidavits of Telford Taylor (including Exhibit A therein referred to) and William P. Massing annexed thereto.

[fol. 575] 4. Stipulation and order granting leave to Mutual Broadcasting System, Inc. to intervene.

5. Affidavit of Harold C. Read, submitted by defendants.

6. Affidavits of Sidney N. Strotz (including Exhibits A through E thereto attached), Frank E. Mullen (including Exhibits 1 through 15 thereto attached), and Philip J. Hennessey, Jr., submitted by plaintiffs in opposition to motions to dismiss complaint or for summary judgment.

7. Affidavit of Telford Taylor in opposition to plaintiffs' motion for preliminary injunction.

8. Affidavit of Fred Weber submitted by intervenor in opposition to plaintiffs' motions for preliminary injunction, including appendices A to K, inclusive.

9. Affidavit of Hope H. Barroll, Jr., submitted by intervenor in opposition to plaintiffs' motions for preliminary injunction, including Exhibit A thereto.

10. Affidavits of Niles Trammell, Edgar Kobak and Harold C. Read, submitted by plaintiffs as reply affidavits.

11. Affidavit of Telford Taylor of January 3, 1942, in opposition to plaintiffs' motions for preliminary injunction, including attachments thereto.

12. Stipulation and order granting temporary suspension of Commission's Order in Docket No. 5060.

13. Opinion of statutory District Court dismissing suit for lack of jurisdiction, together with the dissenting opinion of Judge Bright.

14. Order dismissing the complaint.

15. Plaintiffs' notice of motion and motion for temporary restraining order.

16. Opinion of statutory District Court on motion for temporary restraining order.

17. Findings of fact and conclusion of law of statutory District Court relating to temporary restraining order.

18. Decree of statutory District Court granting temporary restraining order.

19. Opinion of United States Supreme Court on appeal from order dismissing the complaint for lack of jurisdiction, together with dissenting opinion of Mr. Justice Frankfurter.

[fol. 576] 20. Petition to Expedite the Argument in Defendants' Motions for Summary Judgment, including Exhibit A thereto and notation of Judges Bright and Goddard denying said Petition.

21. Affidavit of Frank E. Mullen submitted in support of plaintiffs' motion for preliminary injunction and against motion to dismiss complaint or for summary judgment.

22. Opinion of statutory District Court dismissing the complaint on the merits.

23. Order of statutory District Court dismissing complaint on the merits.

24. Findings of fact of statutory District Court.

25. Decree of statutory District Court granting temporary restraining order.

26. Petition for appeal.

27. Assignments of error.

28. Jurisdictional statement (including Exhibits A to D inclusive).

29. Order allowing appeal.

30. Citation on appeal.

31. Notice of appeal.

a. Addressed to Attorney General of the State of New York, et al.

b. Addressed to Solicitor General of the United States.

32. Bond on appeal.

33. Statement calling attention to the provisions of Supreme Court Rule 12 (3).

34. Appellee's and intervenor's admission of service of papers on appeal.

35. Stipulation and order directing Clerk to transmit original of Exhibit A attached to affidavit of Telford Taylor of November 5, 1941.

36. This praecipe and service thereof.

37. Stipulation re correctness of record.

38. Clerk's Ctf.

Said transcript is to be prepared as required by law and the Rules of this Court, and Rules of the Supreme Court [fols. 577-578] of the United States, and is to be filed in the office of the Clerk of the Supreme Court.

Dated: November 25, 1942.

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

Service of above praecipe accepted and acknowledged this 27th day of November, 1942. The defendants and the intervenor waive their right to file a designation of additional portions of the record.

Charles Fahy, Solicitor Gen. by Samuel Brodsky, Spl. Asst. to Atty. Gen. Charles R. Denny, Gen. Counsel F. C. C. Leon Lauterstein, Atty. for Mutual Broadcasting System, Intervener.

[fol. 579] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 580] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 554

APPELLANTS' STATEMENT OF POINTS AND DESIGNATION OF PORTIONS OF RECORD ON APPEAL—Filed November 30, 1942

1. Come now the appellants in the above-entitled cause and for their statement of the points on which they intend to rely on their appeal to this Court adopt the points contained in their assignments of error heretofore filed herein.

2. Appellants further state that only the following parts of the record, as filed in this Court, need be printed for the hearing of this appeal:

(a) Plaintiffs' complaint and Exhibits A through F, inclusive, thereto attached.

(b) Plaintiffs' notice of motion and motion for preliminary injunction and for temporary restraining order, together with the supporting affidavits of Niles Trammell (including Exhibits I through III, inclusive, attached thereto), John J. Gillen, Jr. and Edward A. Hanover, annexed thereto.

[fol. 581] (c) Defendants' motions to dismiss the complaint or, in the alternative, for summary judgment, together with the affidavits of Telford Taylor (omitting Exhibit A therein referred to, the original of which Exhibit has been certified to this Court separately and not as a part of said transcript of record) and William P. Massing, annexed thereto.

(d) Stipulation and order granting leave to Mutual Broadcasting System, Inc. to intervene.

(e) Affidavit of Harold C. Read, submitted by defendants.

(f) Affidavits of Sidney N. Strotz (including Exhibits A through E thereto attached), Frank E. Mullen (including Exhibits 1 through 15 thereto attached), and Philip J. Hennessey, Jr., submitted by plaintiffs in opposition to motions to dismiss complaint or for summary judgment.

(g) Affidavit of Telford Taylor in opposition to plaintiffs' motion for preliminary injunction.

(h) Affidavit of Fred Weber submitted by intervenor in opposition to plaintiffs' motions for preliminary injunction, including appendices A to K, inclusive.

(i) Affidavit of Hope H. Barroll, Jr., submitted by intervenor in opposition to plaintiffs' motions for preliminary injunction, including Exhibit A thereto.

(j) Affidavits of Niles Trammell, Edgar Kobak and Harold C. Read, submitted by plaintiffs as reply affidavits.

(k) Affidavit of Telford Taylor of January 3, 1942, in opposition to plaintiffs' motions for preliminary injunction, including attachments thereto.

(l) Stipulation and order granting temporary suspension of Commission's Order in Docket No. 5060.

(m) Opinion of statutory District Court dismissing suit for lack of jurisdiction, together with the dissenting opinion of Judge Bright.

(n) Order dismissing the complaint.

(o) Plaintiffs' notice of motion and motion for temporary restraining order.

(p) Opinion of statutory District Court on motion for temporary restraining order.

[fol. 582] (q) Findings of fact and conclusion of law of statutory District Court relating to temporary restraining order.

(r) Decree of statutory District Court granting temporary restraining order.

(s) Opinion of United States Supreme Court on appeal from order dismissing the complaint for lack of jurisdiction, together with dissenting opinion of Mr. Justice Frankfurter.

(t) Affidavit of Frank E. Mullen submitted in support of plaintiffs' motion for preliminary injunction and against motion to dismiss complaint or for summary judgment (including Exhibits 1 through 4 thereto attached).

(u) Opinion of statutory District Court dismissing the complaint on the merits.

(v) Order of statutory District Court dismissing complaint on the merits.

(w) Findings of fact of statutory District Court.

(x) Decree of statutory District Court granting temporary restraining order.

(y) Petition for appeal.

(z) Assignments of error.

(aa) Jurisdictional statement (including Exhibits A to D inclusive).

(bb) Order allowing appeal.

(cc) Citation on appeal.

(dd) Notice of appeal.

1. Addressed to Attorney General of the State of New York, et al.

2. Addressed to Solicitor General of the United States.

(ee) Statement calling attention to the provisions of Supreme Court Rule 12 (3).

(ff) Appellees' and intervenor's admission of service of papers on appeal.

[fols. 583-585] (gg) Stipulation and order directing Clerk to transmit original of Exhibit A attached to affidavit of Telford Taylor of November 5, 1941.

(hh) Appellants' praecipe and service thereof.

John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

Service of the foregoing statement on behalf of each of the appellees is acknowledged this 30th day of November, 1942.

Charles Fahy, by Harry M. Plotkin, Solicitor General of the United States. Harry M. Plotkin, Solicitor for the Federal Communications Commission. Louis G. Caldwell, Solicitor for Mutual Broadcasting System, Inc.

[fols. 586-587] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 554

DESIGNATION OF ADDITIONAL PORTIONS OF RECORD—Filed December 9, 1942

In addition to the portions of the record designated for printing by appellants, appellee desires that the following parts of the record be printed:

1. Petition to expedite reargument and order of district court noted thereon.

2. Stipulation dated December 8, 1942.

Charles Fahy, Solicitor General of the United States.

Acknowledgment of Service

Service of the foregoing designation is hereby acknowledged this 8th day of December, 1942.

John T. Cahill, Counsel for National Broadcasting Company, Inc. David M. Wood, Counsel for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Counsel for Stromberg-Carlson Telephone Manufacturing Company. Leon Lauterstein, Counsel for Mutual Broadcasting System, Inc.

[fols. 588-589] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 554

STIPULATION AS TO RECORD—Filed December 9, 1942

Subject to the approval of this Court, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the administrative record before the Commission—Exhibit A to defendants' Motion to Dismiss the Complaint or, in the Alternative, for Summary Judgment—which consists of approximately 9,000 pages and 707 exhibits, need not be printed as part of the record

and that any party may refer in the briefs to any portions thereof and may include in an appendix to the briefs such portions of the administrative record as are deemed relevant.

Charles Fahy, Solicitor General of the United States. John T. Cahill, Counsel for National Broadcasting Company, Inc. David M. Wood, Counsel for Woodmen of the World Life Insurance Society. Thomas H. Middleton, Counsel for Stromberg-Carlson Telephone Manufacturing Company. Leon Lauterstein, Counsel for Mutual Broadcasting System, Inc.

Dated: December 8, 1942.

[fol. 590] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 554

ORDER NOTING PROBABLE JURISDICTION—December 14, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 47,055. D. C. U. S., Southern New York, Term No. 554. National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, Appellants, vs. The United States of America, Federal Communications Commission and Mutual Broadcasting System, Inc. Filed November 30, 1942. Term No. 554 O. T. 1942.

On October 11, 1941, the Federal Communications Commission amended the aforesaid order as follows:

"Federal Communications Commission,
Washington, D. C.

October 11, 1941.

Order.

"At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 11th day of October, 1941.

"The Commission having under consideration the petition of the Mutual Broadcasting System, filed August 14, 1941, requesting that the Commission amend its order entered in Docket No. 5060 promulgating regulations applicable to radio stations engaged in chain broadcasting by modifying the regulations dealing with option time and the duration of affiliation contracts, having heard oral argument on said petition and having reconsidered its report and order in Docket No. 5060,

"It Is Ordered, That the Commission's order of May 2, 1941, entered in Docket No. 5060, Be And The Same Is Hereby, Amended in the following particulars:

"Sections 3.102, 3.103, 3.104 of the Regulations set forth in said order are hereby amended to read as follows:

"Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

"Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

"Section 3.104. No license shall be granted to a standard broadcast station which options[3] for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours[4] within each four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.[5] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

"The last paragraph of said order is hereby amended to read as follows:

"'It Is Further Ordered, That these regulations shall become effective immediately: *Provided*, That,

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"[3] As used in this section, an option is any contract, agreement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

"[4] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

"[5] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa."

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 554

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

JOHN T. CAHILL,
DAVID M. WOOD,
THOMAS H. MIDDLETON,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 554

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION,

Defendants;

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

JURISDICTIONAL STATEMENT.

Pursuant to Rule 12 of the Supreme Court of the United States, the petitioners in support of the jurisdiction of the Supreme Court to review the judgment, order and decree in question, respectfully represent:

I.

Statutory Provisions Believed to Sustain the Jurisdiction.

1. Section 402(a) of the Communications Act of 1934, United States Code, Title 47, Section 402(a) (47 U. S. C. A., Sec. 402(a)).

2. The Urgent Deficiencies Appropriation Act, October 22, 1913, Chapter 32 (38 Stat. 219, 220; United States Code, Title 28, Section 47(a); 28 U. S. C. A., Section 47(a)). This Act provides that an appeal may be taken directly to the Supreme Court of the United States from decrees made by statutory three-judge courts granting or denying injunctions against the operation of orders of the Interstate Commerce Commission.

Said Section 402(a) of said Communications Act makes the aforesaid section of the Urgent Deficiencies Act applicable to orders of the Federal Communications Commission.

II.

Order of the Federal Communications Commission, the Validity of Which Is Involved.

On May 2, 1941, the Federal Communications Commission made the following order:

"Commission Order in Docket No. 5060.

"In the Matter of the Investigation of Chain Broadcasting.

"May 2, 1941.

"WHEREAS, The Commission on March 18, 1938, by Order No. 37, authorized an investigation 'to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity;'

"WHEREAS, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and 'to make reports to the Commission with recommendations for action by the Commission;'

"WHEREAS, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

"WHEREAS, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

"WHEREAS, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached;

"NOW, THEREFORE, IT IS HEREBY ORDERED, That the following regulations be and they are hereby adopted:

"3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization [1] under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization. See Chapter VII, A, 1.

"3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. See Chapter VII, A, 2; and J.

"3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: *Provided,* That a contract arrangement, or understanding for a one-year period, may be entered into within sixty days prior to the com-

[1] The term 'network organization,' as used herein, includes national and regional network organizations. See Chapter VII, J.

mencement of such one-year period. See Chapter VII, B.

"3.104. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time. See Chapter VII, C.

"3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. See Chapter VII, D.

"3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control[2] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage,

[2] The word 'control,' as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks."

power, frequency, or other related matters) that competition would be substantially restrained by such licensing. See Chapter VII, E.

"3.107. No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network. See Chapter VII, F.

"3.108. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. See Chapter VII, G.

"It Is Further Ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements, or understandings or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE,
Secretary."

with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.'

T. J. SLOWIE,
Secretary."

III.

Date of Decree and of Application for Appeal.

The final decree of the statutory three-Judge Court dismissing appellant's complaint on the merits is dated November 16, 1942, and was entered herein on November 16, 1942.

The application for this appeal was made on November 25, 1942.

IV.

Nature of the Case.

Pursuant to Section 402(a) of the Communications Act of 1934 (47 U. S. C. A. Section 402(a)) and Section 209 of the Judicial Code (28 U. S. C. A. Section 45), a complaint was filed in the District Court of the United States for the Southern District of New York on October 30, 1941, invoking the Court's jurisdiction under said Section 402(a) and subdivision 28 of Section 41 of Title 28, U. S. C. A., to set aside, annul and suspend the said Order of the Federal Communications Commission made on May 2, 1941, as amended October 11, 1941.

A three-judge statutory court was convened pursuant to the provisions of the Urgent Deficiencies Appropriation Act of October 22, 1913, Chapter 32 (38 Stat. 220; 28 U. S. C. A. Section 47.) Appellants moved for a temporary injunction and appellees moved to dismiss the complaint or in the alternative for summary judgment. The motions were argued in the District Court before three judges and a final decree was entered on the 21st day of February, 1942, dismissing the suit for want of jurisdiction, one judge dissenting.

Upon motion of appellants, the District Court granted a stay of the enforcement of said Order of the Federal Communications Commission until May 1, 1942, or the argument of the appeal to the Supreme Court of the United States, whichever were earlier.

An appeal having been taken to the Supreme Court of the United States pursuant to the provisions of said Urgent Deficiencies Appropriation Act and said Section 402(a) of the Communications Act of 1934, the Supreme Court of the United States on June 1, 1942 reversed said final decree dismissing the suit for want of jurisdiction and remanded the cause for further proceedings.

Appellees' motions to dismiss the complaint or in the alternative for summary judgment, together with appellants' motion for a temporary injunction, were argued in the District Court before said three judges on October 8, 1942, and a final decree was entered on November 16, 1942, dismissing the complaint on the merits. At the same time the District Court entered an order granting a stay of the enforcement of said Order of the Federal Communications Commission until February 1, 1943, or the argument of the appeal in the Supreme Court of the United States from the decree dismissing the complaint on the merits, whichever is earlier.

V.

Decisions Believed to Sustain Jurisdiction.

The following decisions are believed to sustain jurisdiction of this appeal:

Rochester Telephone Corp. v. *United States, et al.*, 307 U. S. 125 (1939);

American Telephone & Telegraph Co. v. *United States*, 299 U. S. 232 (1936);

National Broadcasting Company, Inc. et al. v. *United States, et al.*, 316 U. S. 447 (1942);

Columbia Broadcasting System, Inc. v. *United States, et al.*, 316 U. S. 407 (1942).

VI.

Grounds Upon Which It Is Contended That the Questions Involved in This Appeal Are Substantial.

The Order of the Federal Communications Commission which appellants seek to set aside in this suit deals with certain contractual relationships between approximately 600 standard broadcast stations in the United States and the network organizations which supply programs to such standard broadcast stations and pursuant to which nation-wide network radio programs have heretofore been distributed to the nation. The Order does not seek to affect these contracts directly, but does so indirectly by providing that no license shall be granted to stations having contracts with network organizations containing any of the provisions proscribed by the Order. It is contended by appellants that the proscribed provisions are essential to their nation-wide network broadcasting.

Among the contentions raised by appellants on this appeal are the following:

1. The construction of the Federal Communications Act of 1934 advanced by appellees and by the statutory three-judge district court to sustain the power of the Federal Communications Commission to promulgate the Order is repugnant to Section 326 of the Communications Act of 1934, the First Amendment to the Constitution of the United States and Article I, Section 1 of the Constitution of the United States.

2. The Order is an attempt on the part of the Federal Communications Commission to regulate network broadcasting pursuant to the Anti-Trust laws in violation of the clear provisions and intent of the Communications Act of 1934 and in derogation of the power of the Department of Justice and the Federal courts to deal with such matters.

3. The Order bears no reasonable relation to the standard of public interest, convenience and necessity adopted by the Communications Act of 1934 and is arbitrary and capricious.

4. The disposition of this suit by the statutory three-judge district court upon the basis of the record made before the Federal Communications Commission and without according appellants a trial in the District Court upon the reasonableness of the relation of the Order to the standard of public interest, convenience and necessity adopted by the Communications Act of 1934, is not in accordance with the principles covering the judicial review of such an order as heretofore laid down by the Supreme Court of the United States.

Appellants respectfully submit that the United States Supreme Court has jurisdiction of this appeal.

A copy of the opinion delivered by the District Court upon the rendering of the decree dismissing the suit for

want of jurisdiction, together with a copy of the dissenting opinion of Judge Bright, is attached to this statement as Appendix A. A copy of the opinion delivered by the District Court, together with its findings of fact, conclusions of law and decree granting plaintiffs' motion for a stay pending appeal to the Supreme Court of the United States from the decree dismissing the suit for want of jurisdiction, is attached to this statement as Appendix B. A copy of the opinion delivered by the Supreme Court of the United States reversing the decree of the District Court dismissing the suit for want of jurisdiction, together with the dissenting opinion of Mr. Justice Frankfurter, is attached to this statement as Appendix C.* A copy of the opinion delivered by the District Court upon the rendering of the decree dismissing the complaint on the merits and which is sought to be reviewed, together with the order dismissing the complaint, the findings of fact and the decree granting a temporary restraining order pending this appeal, is attached to this statement as Appendix D.

Respectfully submitted,

JOHN T. CAHILL,
Solicitor for National Broadcasting Company, Inc.;

DAVID M. WOOD,
Solicitor for Woodmen of the World, Life Insurance Society;

THOMAS H. MIDDLETON,
Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

Dated, November 25, 1942.

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* (Clerk's Note:—The opinion of this Court is reported 316 U. S. 407 and is not reprinted in the Appendix.)

APPENDIX A.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil 16-178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Defendants*,

MUTUAL BROADCASTING SYSTEM, INC., *Intervener*.

Civil 16-179.

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff*,

v.

THE UNITED STATES OF AMERICA, *Defendant*,

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Interveners*.

Before L. Hand, C. J.; Goddard and Bright, D. JJ.

Upon motions before answer by the defendants under Rule 12 (b)(1) to dismiss for lack of jurisdiction the complaints in two actions brought under § 402 (a) of Title 47, U. S. Code, to enjoin and set aside certain regulations of the Federal Communications Commission.

John T. Cahill, for National Broadcasting Company.

Charles E. Hughes, Jr., for the Columbia Broadcasting System.

Telford Taylor and Thomas E. Harris, for the United States and the Commission.

Louis G. Caldwell, for the Mutual Broadcasting System, Inc., Intervener.

L. HAND, *C. J.*:

These actions were brought to declare invalid and set aside certain regulations originally promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941; in their final form they appear at the end of this opinion. After the actions were filed the Commission, on October 31, 1941, promulgated a further regulation in the form of a "minute", also appearing at the end of the opinion. Preparatory to the issuance of the regulations the Commission had held hearings at which nearly 9,000 pages of testimony were taken; among others whom it had invited to attend, were the two plaintiff "networks", which accepted and took part by introducing extensive evidence. When the regulations appeared, the "networks" brought the two actions at bar under § 402 (a) of Title 47, U. S. Code, to set them aside as beyond the powers of the Commission and as arbitrary, unreasonable and without basis in the evidence. Upon the complaints so filed and voluminous affidavits they then moved for a preliminary injunction against their enforcement *pendente lite*. In the action brought by the National Broadcasting Company, two "affiliated stations" have joined as parties plaintiff and the United States and the Commission were originally joined as defendants; in the action brought by the Columbia Broadcasting System it alone is plaintiff and the United States is the only defendant, but the Commission later intervened. A third "net work", the Mutual Broadcasting System, intervened as a defendant in both actions. The United States and the Commission have countered the plaintiffs' motions by motions, made before answer, to dismiss the complaints for lack of jurisdiction over the subject-matter under Rule 12 (b)(1), and for summary judgment under Rule 56 (b). The Mutual Broadcasting System has answered and joined in the motions of the other defendants. All these motions having come on before Judge Goddard, he assembled a court composed of three judges, to whom the hearing was transferred in accordance with the Act of October 22, 1913 (38 St. L. 219).

Since we are deciding that the District Court for the Southern District of New York has no jurisdiction over the subject-matter of the actions either as a court of three judges or of one, it will not be necessary to consider the merits; nevertheless we must say something about the background of the regulations in order to make our discussion intelligible. The business of broadcasting depends for its support principally, if not altogether, upon advertising. The broadcasting is done by "stations", each "station" selecting programs which it thinks will be popular, either spoken, sung or instrumentally performed in its own studio, or relayed to it by a "network" as will appear. Interjected among these programs, occur those fervid importunities of advertisers, upon the results of which the "station" must depend for its revenue. A single "station" dependent upon its own programs alone would be very expensive to operate, and its income would be small; especially if, as has become customary, it were to add to its advertising programs what are called "sustaining programs", which are not paid for, but which are thought to give a general popularity to the "station". These circumstances have long since resulted in the creation of "networks" of the kind with which the actions at bar are concerned; that is to say, in a widespread system of contracts of a single company with separate "stations" scattered all over the Union and known as "affiliates". The plaintiffs, National Broadcasting Company and the Columbia Broadcasting System, are two such "networks"; they own and operate broadcasting "stations" of their own, but, although they depend in part upon these as outlets, their principal reliance is upon their "affiliates". They originate a great variety of programs—usually in a studio of one of their owned "stations"—which they transmit by telephone to the "affiliates" for broadcasting. The audience of such a "network" in this way becomes the aggregate of the audiences of its "affiliated stations", and this enables it to charge so much higher prices for advertising than the "affiliates" could charge alone, that both they and the "network" can divide the returns to their common advantage.

There are four such national "networks", two owned by the National Broadcasting Company (one of which we are told it has disposed of since these actions were begun), another by the Columbia Broadcasting System, and the fourth by the Mutual Broadcasting System, which has intervened because it feels itself aggrieved by the practices against which the regulations in suit were directed.

Every broadcasting "station" must have a license and the Federal Communications Commission alone has power to grant, refuse, revoke, renew or modify licenses. The Commission also has "authority to make special regulations applicable to radio stations engaged in chain broadcasting", § 303 (i). By virtue of these powers it assumed to promulgate the regulations now challenged, all of which it will be observed, are no more than declarations of the conditions upon which the Commission will in the future issue licenses to "stations". The defendants' motions to dismiss the complaints are based upon the theory that these regulations are not "orders" within the meaning of § 402 (a), and that therefore this court has no jurisdiction over them; indeed, that they are not "orders" of any sort, but merely announcements of the course which it will pursue in the future, whenever an "affiliated station" applies for a new license, or for the renewal of an existing one. To this the "networks" reply that the regulations had an immediate effect; that they not only announced what would be the future practice of the Commission, but presently adjudicated the invalidity of the contracts between themselves and their "affiliates"; and that they have in fact already caused serious losses, because a number of "affiliates" have declared that they will be obliged to break their contracts when their licenses are renewed, and have thus made it impossible for the "networks" to accept large and valuable advertising contracts.

We do not think that we need commit ourselves generally as to what "orders" are reviewable under the Act of October 22, 1913 (38 St. L. 219), which § 402 (a) of Title 47, U. S. Code, incorporates by reference as the measure of our jurisdiction. So far as we have found, the Supreme

Court has never declared that that statute authorizes review of any decision of an administrative tribunal which neither directs anyone to do anything, nor finally adjudicates a fact to exist upon which some right or duty immediately depends. We agree that it is no answer that the decision challenged is "legislative" in character, (*The Chicago Junction Case*, 264 U. S. 258, 263), and, as we have just implied, it is enough if it authoritatively determines the existence of a fact that at once sets in execution some sanction, though the decision itself be not in form a command. *United States* v. *Baltimore & Ohio Railroad*, 293 U. S. 454; *Powell* v. *United States*, 300 U. S. 276; *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125; *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 408. (*Colorado* v. *United States*, 271 U. S. 153; *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382; and *United States* v. *Idaho*, 298 U. S. 105, though they are of the same kind, are scarcely controlling, because they turned upon §1(20) of the Interstate Commerce Act.) But decisions which are no more than announcements of future administrative action have never, so far as we can find, been treated as within this statute. That does not necessarily imply that a person presently injured is without any remedy when the threatened action would be unlawful; the situation then may present all the elements upon which equity will intervene in ordinary course. *Shields* v. *Utah Idaho Central Railroad Company*, 305 U. S. 177. It may be that the plaintiffs at bar could bring such actions in equity; at least it does not appear that recourse to them is positively forbidden, as was for example the case in *Venner* v. *Michigan Central*, 271 U. S. 127. But even so they would not be the actions at bar, which can be brought only under the statute, since otherwise the United States cannot be sued, or the Commission sued in this district, assuming that it was in any event possible to join it at all. Such actions would have to depend jurisdictionally upon the same facts as any other action against a public officer who threatens to do an unlawful act.

We should therefore have a great deal of doubt whether the regulations could in any view be regarded as "orders" which we could review under the Act of October 22, 1913 (38 St. L. 219), if the case came to us under the statute *in vacuo*. It does not, because, although, as we have said, § 402 (a) incorporates it by reference, those orders are excepted which are mentioned in the parenthesis: to wit, all orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license". Relief from such orders is provided in § 402 (b), (c), (d), (e) and (f); it is by appeal to the Court of Appeals of the District of Columbia, and it is to be heard upon the record made at the hearing of an application by the Commission. The procedure upon such appeals is in substance the same as that which has now become standard for the review of the decisions of administrative tribunals in adversary proceedings. Consequently, if any of the "affiliates" of the plaintiff "networks" should hereafter apply for a renewal of their licenses; and if, as we assume it will, the Commission adheres to its regulations, the resulting modification of the license will be reviewable only in the Court of Appeals of the District and upon the record made at that hearing. We have seen, however, that the regulations are nothing more than a declaration—or if one chooses, a threat—by the Commission that it will impose those conditions upon any renewal of a license in the future. No change is made in the status of "affiliates" meanwhile; their existing contracts with the "networks" remain enforceable; nor has the Commission given any evidence of an intention to use them as the basis for a revocation of existing licenses under § 312 (a). On the contrary, the "minute" we have mentioned commits it to a contrary course. Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues. This is inexorably true because here the only question is whether the Commission

has power to impose the conditions mentioned in the regulations when a "station" applies for renewal; exactly the question which will determine the actual renewal of a license. The prescribed procedure will therefore be disregarded only because the putative wrong is merely threatened, instead of being in the very act of commission. Whatever may ordinarily be the proper scope of the word "order" in the Act of October 22, 1913 (38 St. L. 219), it seems to us clear that Congress could not have intended such an anomalous result as will follow upon treating these particular regulations as such "orders".

To this the plaintiffs make two answers. First, they say that the threat itself has already caused them loss, as we have said. Possibly that might support an action to compel the Commission to raise the issues immediately, as by a revocation proceeding under § 312 (a); even so it should not substitute another court for the Commission and the Court of Appeals, certainly not this court in an action against the United States and the Commission. We need not decide the point, however, because the "minute" we have quoted offers equivalent relief without risk to any "station" which may challenge the regulations. Next, the plaintiffs say that they may not be able to raise the issue in a proceeding for the renewal of a license, because the "affiliated stations" may fear to incur the Commission's displeasure. As to the National Broadcasting Company this is plainly untrue because two of its "affiliates" have joined it as plaintiffs. As to the Columbia Broadcasting System, its complaint, read most favorably, does perhaps allege that none of its "affiliates" will challenge the regulations when their licenses expire; at any rate, to avoid any doubts, we shall so assume, little as that seems likely to be the case. We may do so, because the issue is irrelevant anyway, for the plaintiff "networks" have an adequate remedy under § 402 itself. They allege—and there seems to be no question about it—that their interest will be adversely affected by the enforcement of the regulations; if so, they can appeal to the Court of Appeals of the District from any order imposing unlawful conditions.

upon an "affiliate's" license. § 402 (b) (2). It is true that the section does not in terms provide that they shall also be heard in the proceeding before the Commission under § 309 (a) for the "renewal or modification of a station license;" but the Commission has itself answered that objection by § 1.102 of its regulations which permits intervention. An unreasonable refusal of the privilege so offered would appear to be a good objection on appeal under § 402 (b) (2); for it is not likely that the statute which grants an appeal to all interested parties, meant not to give them the opportunity to make a record on which they can succeed upon that appeal. At any rate until the Commission shows some disposition to deny them a fair hearing in a proceeding for renewal of an "affiliate's" license, we are not to assume that it will do so. And even if that should appear, the resulting right of action, if any, would not, as we have said, be in this court or against the United States. For the foregoing reasons the complaints will be dismissed for lack of jurisdiction over the subject-matter.

We do not understand that any findings of fact are proper under Rule 52 (a), which provides for such findings only in "actions tried upon the facts without a jury." It is true that the plaintiffs have moved for a preliminary injunction, and that the rule also requires findings "in granting or refusing interlocutory injunctions;" but we are not "refusing" any injunction. Once the complaints are dismissed for lack of jurisdiction, the motions become moot and we shall not pass upon them at all. We are therefore entering judgment in each action without findings.

Complaints dismissed for lack of jurisdiction.

LEARNED HAND,
HENRY W. GODDARD.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil 16-178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Defendants*.

MUTUAL BROADCASTING SYSTEM, INC., *Intervener*.

Civil 16-179.

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Interveners*.

BRIGHT, *D. J.*:

As I read the opinion of my brothers, they would dismiss for want of jurisdiction because nothing reviewable has been done, and that even after a license is denied, the only review thereof would be by appeal to the Court of Appeals in the District of Columbia.

By Section 402-a of the Communications Act of 1934, we have jurisdiction to enjoin, set aside, annul or suspend an order of the Commission, except where it grants or refuses an application for a construction permit, for the granting, renewal or modification of a station license, or suspending a radio operator's license. These excepted matters can be reviewed only by appeal to the Court of Appeals aforesaid. This order, in my opinion, does not come within any of the excepted provisions. No application has been or is here made for any such relief, and the order sought to be reviewed does not arise out of any such application.

There is no question in my mind that the order sought to be reviewed is one which, under the terms of Section 402-a, we have jurisdiction to enjoin. It is designated by the defendants as a "commission order". It has the usual mandatory clauses found in orders. It was by its terms obviously entered after an investigation made upon the Commission's own motion to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity. It promulgates certain regulations, an obvious and attempted exercise of the Commission's rule-making power. It is clearly an attempt to make rules because at the time there was nothing else before the Commission upon which it could or did act. All of these rules, or regulations as they are called in the order, relate only to standard broadcasting stations having contracts with a network organization, except rule 3.106, which relates to a license to be granted to a network organization having more than one station in a service area, and rule 3.107 which proscribes a broadcasting station affiliated with a network maintaining more than one network. These rules do not apply to stations not affiliated with any network. They apply only to contractual relations with networks, and in addition, prohibit the ownership by a network of more than one station in a specified service area and the ownership by any organization of more than one network. The order fixes as immediately the time when it shall become effective. In other respects it has all the earmarks of a final order.

That it was intended to be final is further evidenced by the Commission's report. It finds that the public interest "requires" the application of the regulations to stations affiliated with regional as well as with national networks. It affirms its powers to do so under Section 303-(i) of the Communications Act, and clearly reveals that it is exercising its rule making power when it queries whether the Commission can formulate into "general rules and regulations" the principles which it *intends* to apply in passing on individual applications. That its action is final is further emphasized by the statement, "We believe that the announcement

of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice. * * * The regulations we are now adopting are nothing more than the expression of the general policy *we will apply* in exercising our licensing power. The formulation of a regulation in general terms is an important aid to *consistency and predictability* and does not prejudice any rights of the applicant."

That it is exercising this rule-making power is further emphasized by another statement in its report, that Section 303-(i) gives the Commission specific power to make special regulations applying to radio stations engaged in chain broadcasting and that "no language could more clearly cover *what we are doing here*".

What it has done emphasizes more the finality of its order, which is an affirmative direction that thereafter no standard broadcasting station shall contract in terms prohibited, and ultimately puts an end to service by networks under contracts now existing. In fact, I think that the regulations are intended to effect existing contracts for the effective date of the order is deferred until November 15th, 1941, "with respect to existing contracts, arrangements or understandings". This certainly is not a statement that the regulations shall not apply to existing contracts; it is merely a postponement as to when the axe will fall.

The particular agreements prohibited are presently contained in most of the affiliation contracts of the two complaining networks. They state those provisions are essential to the proper and successful conduct of their business, and in deciding the question of jurisdiction, I believe we must assume this to be true. It is also shown by them, without contradiction, that between the time the regulations were promulgated and the commencement of these actions, not less than twenty-four broadcasting stations having affiliation contracts with NBC have cancelled their contracts as a result of the order in question, and not less than twenty-four others having such contracts, have served notice that they do not intend to abide by the terms of such contracts unless they are conformed to the Commission's order. Similarly, it is shown by the affidavits submitted by CBS

that some of the stations affiliated with it are refusing to renew their affiliation contracts, some are threatening to cancel or repudiate them, and some have already cancelled on the ground that the rules in question prohibit them. There is thus a present injury.

It is suggested that the plaintiffs must wait until the Commission has ruled upon the application of a broadcasting station for a renewal of its license. Can it be said that the Commission will change its rules, in view of the positive statement it has already made with reference thereto and above quoted? Must these networks await the idle ceremony of a denial of a license before any relief can be sought when it is perfectly obvious that no relief will be given? And what relief could they get if they did wait? The networks are not to be licensed, only the individual stations who make application. But it is said the networks could intervene and be heard. All that might be said or urged in their behalf has doubtless been communicated to the Commission in the three years between March 18, 1938, and May 2, 1941, when the investigation was going on. Must they march up the hill and down again, with the probability of being met with the statement that the Commission has given the matter due consideration and has done what it intends to abide by, as it has definitely said in its report? It is said, however, that by a minute adopted after these actions were brought, the Commission has manifested its intention to permit the networks to intervene and be heard upon the subject of the granting or denial of the license. That minute refers obviously only to a station, and insofar as it attempts to change the nature of the order sought to be reviewed or to obviate a review would be abortive. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433-452. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498-515.

This court has reviewed the rule-making power of this very Commission without being troubled by the question of jurisdiction. *A. T. & T. Co.* v. *U. S.*, 14 F. Supp. 121, affirmed 299 U. S. 232. That there can be a review of an order exercising the delegated legislative function of rate-

making and rule-making is admitted in *U. S.* v. *Los Angeles R. R.*, 273 U. S. 299, 309. In *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, where bills were filed to enjoin orders prescribing methods of account, bookkeeping and reports, jurisdiction was not questioned in a court always jealous of its jurisdiction. In *Kansas City Southern Railway* v. *U. S.*, 231 U. S. 423, jurisdiction was again assumed of a petition to declare invalid and to enjoin regulations relative to accounting. In *Skinner & Eddy Corp.* v. *U. S.*, 249 U. S. 557-562, which involved a refusal of a suspension of a tariff, jurisdiction was assailed, at least until after a further remedy was sought; and it was there stated that where contention was made that the Commission had exceeded its statutory powers, courts have jurisdiction of suits to enjoin even if the plaintiff had not attempted to secure redress before the Commission. In the *Assigned Car Cases*, 274 U. S. 564, suits were brought to enjoin and annul an order which prescribed a rule governing the distribution of cars among coal mines after an investigation by the Interstate Commerce Commission of its own motion, and no question of right of review was raised. And in *A. F. of L.* v. *Labor Board*, 308 U. S. 401, 408, it was admitted that administrative determinations which are not commands may for all practical purposes, determine rights as effectively as the judgment of a court and may be re-examined by courts under particular statutes providing for the review of orders. In *Pierce* v. *Society of Sisters*, 268 U. S. 510, suit was brought by a private school to restrain the enforcement of an Oregon statute which required primary education in public schools, and jurisdiction was sustained, Mr. Justice McReynolds writing that the suits were not premature, that the injury to the plaintiffs was present and very real and not a mere possibility in the remote future.

Dated: February 20, 1942.

JOHN BRIGHT,
U. S. D. J.

APPENDIX B.

UNITED STATES DISTRICT COURT, SOUTHERN DITRICT OF NEW YORK.

Civil Action No. 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Defendants*

MUTUAL BROADCASTING SYSTEM, INC., *Intervener.*

This cause came on to be further heard at the February, 1942, term of this court and was argued by counsel and thereupon, upon consideration thereof, it appearing that the relief herein granted is necessary to preserve the status quo pending an appeal by the plaintiffs to the Supreme Court, for the reasons appearing in the Opinion, and Findings of Fact and Conclusion of Law, filed herewith, it is

ORDERED, ADJUDGED AND DECREED that until May first, 1942 or the argument of the appeal herein to the Supreme Court of the United States, whichever is earlier, the Federal Communications Commisison be and the same hereby is restrained from enforcing those regulations which were issued in their amended form on October 11, 1942, and which are known as "Order in Docket No. 5060."

LEARNED HAND,
U. S. C. J.

HENRY W. GODDARD,
U. S. D. J.

JOHN BRIGHT,
U. S. D. J.

UNITED STATES DISTRICT COURT, SOUTHERN DITRICT OF NEW YORK.

Civil Action No. 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Defendants*.

MUTUAL BROADCASTING SYSTEM, INC., *Intervener*.

FINDINGS OF FACT

I. That if the Federal Communications Commission, pending the plaintiffs' appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; and if this court—contrary to its said judgment—has in fact jurisdiction over the cause of action stated in the complaint; the plaintiffs will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to the plaintiffs arising from enforcement, if the conditions mentioned in the First Finding exist.

CONCLUSION OF LAW

That the plaintiffs are entitled to a stay pending their appeal to the Supreme Court; said stay being an order

forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of May, 1942, whichever is earlier.

LEARNED HAND,
U. S. C. J.

HENRY W. GODDARD,
U. S. D. J.

JOHN BRIGHT,
U. S. D. J.

UNITED STATES DISTRICT COURT, SOUTHERN DITRICT OF NEW YORK.

Civil Action No. 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Defendants.*

MUTUAL BROADCASTING SYSTEM, INC., *Intervener.*

Civil Action No. 16-179.

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*,

THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING COMPANY, INC., *Intervenors.*

Before L. Hand, C. J.; Goddard and Bright, D. JJ.

Per CURIAM:

The Commision is of course right in saying that we have decided that the plaintiffs have adequate protection out-

side of these actions and in spite of their dismissal; nevertheless, in deciding whether a stay should be granted pending an appeal, we must assume that we may be mistaken, certainly a not unreasonable assumption in view of Judge Bright's dissent. If so, the plaintiffs will not be adequately protected, and indeed they may not be anyway if the Commission does not withhold enforcement in all cases until the issues could be once and for all determined in a renewal proceeding. Considering on the one hand that if the regulations are enforced the networks will be obliged to revise their whole plan of operations to their great disadvantage, and on the other that the Commission itself gave no evidence before these actions were commenced that the proposed changes were of such immediately pressing importance that a further delay of two months will be a serious injury to the public, it seems to us that we should use our discretion in the plaintiffs' favor to stay enforcement of the regulations until they can argue their appeal. For these reasons we will grant such a stay until the argument of the appeal before the Supreme Court or the first day of May, 1942, whichever comes first. For any further stay the plaintiffs must apply to the Supreme Court itself, or to the Circuit Justice.

LEARNED HAND,
U. S. C. J.

HENRY W. GODDARD,
U. S. D. J.

JOHN BRIGHT,
U. S. D. J.

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APPENDIX C.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 16—178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Defendants*

Civil 16—179

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Intervenors*.

Before L. HAND C. J., and GODDARD and BRIGHT, D. J. J.

On motions by the defendants for summary judgments dismissing the complaints herein two actions to "annul" certain regulations of the Federal Communications Commission and to enjoin the Commission from enforcing them.

CHARLES R. DENNY for the Commission.

CHARLES E. HUGHES, JR., for the Columbia Broadcasting System, Inc.

JOHN T. CAHILL for the National Broadcasting Company, Inc.

L. HAND, C. J.: These cases come before us a second time upon motions made by the defendants and the Mutual Broadcasting System—which has intervened—summarily to dismiss the complaints. The motions are made upon

the complaints, upon certain affidavits of the counsel for the Commission, upon the Commission's report and all the proceedings and evidence before it, and—we shall assume—upon the affidavits filed by the plaintiffs on their motions for preliminary injunctions. We shall not repeat the outlines of the controversy as set forth in our opinion in 44 Fed. Suppl. 688, and in that of the Supreme Court which reversed our judgments dismissing the complaints, 316 U. S. 407; but shall proceed directly to consider the points raised.

The most important of these is whether the Commission had power to pass the challenged regulations. Everyone agrees that in granting licenses under §309 of Title 47, U. S. Code, it must distribute the available wave-lengths so as to give greatest possible service, and that it must see to it that all applicants have the necessary technical ability to broadcast programs, that the stations are properly constructed and properly manned and do not interfere with other stations, and that the licensees are responsible, morally and financially. All these things and perhaps more, the Commission may regulate in discharge of its duty to promote the "public convenience, interest, or necessity." The regulations at bar have, however, nothing to do with these qualifications of a licensee; they are addressed, not to his ability to broadcast any programs which he may accept, but to his freedom to procure other programs than those to which by contract with, or by the control of, the "networks" he is limited; they touch, not how he shall broadcast, but how unrestricted he shall be in doing so. The plaintiffs say that, judged both by its history and by its language, the Act gave the Commission power to consider only the qualifications first specified, leaving outside any administrative control all arrangements by which a station secures its programs. They say that, although it is true that §313 makes "all laws * * * relating to unlawful restraints * * * applicable to * * * interstate or foreign radio communications," and that the courts have jurisdiction in this way to annul monopolies or restrictive contracts which affect broadcasting, only courts may do so; the Commission must disregard any such considerations when deciding whether to grant or refuse a license.

Section 303 defines the Commission's powers; its original was §4 of the Radio Act of 1927 which had eleven subdivisions, of which the first ten were the same as the first eleven of §303 except for a new subdivision ("g") introduced into §303. The eighth subdivision ("h") of §4 of the Radio Act (now the ninth ("i") of §303) gave the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcastng;" and on it the Commission particularly relied. The plaintiffs answer that it was meant merely to give the Commission control over the power and wave-lengths used by stations while connected with "networks" for "chain broadcasting." It was introduced by an amendment in the Senate and originally read that the Commission should have power, "when stations are connected by wire for chain broadcasting," to "determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting" The first clause of this amendment was indeed limited as the plaintiffs say; but the same was not true of the second clause. "Equitable radio service to the listeners" was a comprehensive phrase, read most naturally, it should include the best possible service compatible with such burdens as it was reasonable to impose upon the "networks" and their "affiliates"—"equitable," that is, in the sense that the interests of both sides were to be weighed. The fact that the occasion for the amendment appears to have been the Senate's apprehension that the "networks" might drown out "unaffiliated" stations, by no means circumscribed the scope of these words. This amendment finally emerged from Conference and was enacted, in the broad terms we have quoted; it would be altogether unwarranted to assume that it was intended to adopt the limited clause and to abandon the general one. We may start therefore with the strong probability that even in the Radio Act of 1927 the Commission had power by virtue of this sub-division to regulate "chain broadcasting" generally in the interest of "listeners."

The amendment to §303 of the Communications Act of 1934, that is, the interpolation of subdivision "g," confirms this interpretation. That subdivision reads as follows: "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." We can see no reason for confining the last clause to scientific or engineering problems; the purpose is apparent to give the Commission power to foster the industry in all appropriate ways. It is not clear that this was a new purpose; but if it was, it infused the powers already granted in the earlier act, broadening them in accord with the changed outlook—the power granted under subdivision "i" among the rest. The duty—for the power imposed a corresponding duty—to "encourage" the "larger" use of radio incidentally presupposed a power to prevent the frustration of the purpose so disclosed; we are not to construe the section as at war with itself. Therefore, even if §303 stood alone, we should hold that subdivision "i" granted power to the Commission to consider the effect upon a station's choice of programs of any controls or restrictions exercised by the "networks."

However, §303 does not stand alone. In addition to providing that all laws "relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade" should apply to "radio communications," §313 also took over from §15 of the Act of 1927 the provision that in actions brought under those laws or in proceedings to enforce orders of the Federal Trade Commission, whenever "any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may • • • decree that the license of such licensee shall • • • be revoked." As will be observed, revocation was here made a penalty like other penalties for monopoly or restraint of trade; the courts were not to use it as a means of compelling a licensee to furnish service free from unlawful restrictions, but to punish him for his past mis-conduct, the discretion accorded them being exercised according to the degree of his "guilt." This was in harmony with

the general scheme, for a court is not in good position to know how far a monopolistic or unfair competitive practice may interfere with "the larger and more effective use of radio in the public interest;" if any official was competent to do so, it was the Commission. Section 13 of the Radio Act of 1927 had provided that if a court revoked a license, the Commission must refuse to renew it, but it had stopped there; and, as the law then stood, it might perhaps have been argued with some show of plausibility that an applicant's monopolistic or unfair competitive practices in the past were not relevant to the grant of a license.

However that may have been, §13 was amended in 1934 by adding a new clause, and the resultant §311, in addition to retaining the old language forbidding the restoration of a forfeited license, contained a new one providing that the Commission is "authorized to refuse such station license" whenever the applicant had been "finally adjudged guilty" by a "Federal court of * * * attempting unlawfully to monopolize radio communication * * * or to have been using unfair methods of competition." That power was certainly not to be used as a punishment; the Commission was not to overrule the court which had decided not to impose the penalty. Such a power would have been open to serious constitutional objection. What use then was the Commission to make of an adjudication of the applicant's "guilt"? Only, we submit, by considering it as evidence that, if granted a license, he would not use it for the "public convenience, interest, or necessity," i.e. that the grant of a license would not "encourage the larger and more effective use of radio in the public interest." The necessary implication from this was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee. Thus, whatever may have been the limits of the Commission's earlier powers, manifestly after 1934 they included a consideration of how far licensees might be improperly restricted in the exploitation of their licenses.

The plaintiffs do not concede even this, as we understand it, but in any event they insist that the exercise of any such power was conditioned upon an earlier adjudication by some court. We can see no reason to suppose (although apparently the Commission does not agree) that an applicant's violation of the statutes against monopoly and unfair competition, as such and alone, ever disentitles him to a license. It is indeed evidence relevant to his fitness for the reasons we have just given; but it is such only as any past conduct may be an earnest of what is to be expected in the future, and because a repetition would be prejudicial to the public interest. We construe this clause of §311 as going no further than to provide the Commission with an estoppel as to any facts which a court may have found; these may be taken as data for any rational inference that can be drawn from them relevant to the ultimate issue; but "guilt" as "guilt" is not the ultimate issue. Certainly that is the only effect which it is necessary to give the clause; there is not the slightest warrant for inferring that in the absence of an adjudication, the Commission may not determine what has been an applicant's past conduct, or may not consider how far, if repeated, it would interfere with the fullest use of his license. Whatever may be the mysteries enveloping an adjudication of "guilt" under the Anti-Trust laws which make that issue unfit to be entrusted as such to profane hands, the Commission is certainly peculiarly competent to appraise the effect upon broadcasting of restrictive or monopolistic practices, and is as competent to decide whether an applicant is likely to engage in them as it is to decide any of the other issues which come before it. The decision in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, is irrelevant; the only question decided was whether the injury suffered by an existing station was a material factor in licensing a new station.

The plaintiffs next challenge the regulations because they lay down general conditions for the grant of licenses instead of reserving decision until the issues arise upon an application. Such a doctrine would go far to destroy the power to make any regulations at all; nor can we see the

advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future. It may perhaps be true that a party, who had no notice of the hearings before the Commission and no opportunity to present his side, would be entitled, when applying for a license, to a reconsideration of those findings upon which the regulations rested. None of the plaintiffs at bar are in that position; they were amply advised of what the Commission proposed; they were invited to attend; all but the co-plaintiff "affiliates" of the National Broadcasting Company did so, put in whatever evidence they wished and were heard before the original regulations were passed, and again at the rehearing. They at any rate were accorded all the privileges they would have had if they had intervened in an application for a license. It would be futile after the expenditure of so much time and labor to hold that the proceedings were only advisory and concluded nobody; indeed, the mere fact that the regulations are "orders" reviewable under § 402(a) would seem to preclude such a conclusion. We do not understand the Supreme Court to mean that every minatory gesture of the Commission is reviewable under that section.

The next objection is that the Commission did not really find that the forbidden practices worked against "the public convenience, interest, or necessity," but that it rested upon its supposed duty to deny the applications of all who proposed to use their licenses in violation of the Anti-Trust laws. The Commission in one passage of its report does indeed seem so to have understood the statute, though it would scarcely be fair to say that it held as much; but, be that as it may, it did not base its action upon that theory. It made specific findings in the case of each regulation that the contract or the control which it forbade was against the public interest because it took away the stations' free choice without any corresponding advantage to the industry as a whole. Each regulation was a specific exercise of power, addressed to a particular practice which interfered with the most "effective use of radio in the public interest."

The only constitutional objections which we need consider are two: that the standard set by § 303 ("public con-

venience, interest, or necessity") is too vague; and that the regulations invade the privilege of free speech. Although the Supreme Court has twice at least upheld the standard when applied to the construction of stations or to the allocation of wave lengths (*Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, 138; (semble) *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428), the plaintiffs insist that it will not serve if used to regulate the business arrangements of a station. We are assuming that when so used it demands the widest practicable variety in the choice of programs available for broadcasting; that system which will most stimulate and liberate the ingenuity of those who purvey them to the public. There can be no doubt that, if the introductory clause of § 303 will bear that construction the test is definite enough—and indeed peculiarly adapted to the putative proficiency of the Commission in its field. Nor can we see why, when applied to the issue of the licensee's freedom from restraint, the test is not a fair gloss to be imposed upon the clause. It is impossible in a single rubric to specify all the occasions to which it will apply, and the effort at specification is usually abortive for they cannot all be foreshadowed. It is enough if the delegated power be so defined that a clue can be found in it for dealing with the several occasions which may arise. That seems to us to be the situation here.

The argument drawn from the First Amendment, as we understand it, is this. It is true that the regulations do not profess directly to control what programs the stations may broadcast; but they do so indirectly. They do this by forbidding them to make the forbidden contracts with "networks" even though they believe that these will bring them better programs than they can get in any other way; and it is not necessary for a law directly to control the substance of an utterance for it to invade the right of free speech. We agree that the regulations might be invalid though they do not prohibit programs on the basis of their contents; they do fetter the choice of the stations; absolutely free choice would include the privilege of deciding that

they preferred the opportunities open to them under the "networks" contracts to those which would be otherwise available. The Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i.e. the interests, first, of the "listeners," next, of any licensees who may prefer to be freer of the "networks" than they are, and last, of any future competing "networks." Whether or not the conflict between these interests and those of the "networks" and their "affiliates" has been properly composed, no question of free speech can arise.

The last question upon the merits is whether the Commission's findings are so plainly without support in the evidence as to be "arbitrary or capricious," § 402(e); that is, whether the regulations are certain not to promote the "public concenience, interest, or necessity." A majority of the Commission, after a long and painstaking investigation, has concluded that the net result will be to give a larger choice to stations without sensibly diminishing the services of "chain broadcasting," which the report highly commended. We are asked to say that there is no reasonable basis for such a conclusion; to say that no reasonable person could find in the evidence any support for it. The industry at large holds conflicting views; the plaintiffs on the one hand believe that the prohibitions will in the end destroy "chain broadcasting" altogether; the Mutual Broadcasting System and a number of other interested per- Broadcasting System and a number of other interested persons think otherwise. Each side has stated its reasons and the Commission has chosen. It was created to make such choices because Congress believed that it would acquire in its special sphere a skill which courts could not match; and it is now hornbook law that the conclusions of such tribunals are not to be disturbed except in the plainest case. That

doctrine applies here with especial force just because the findings are necessarily prospective; time alone can decide their success or their failure. The measure of our power is to say whether there was any substantial evidence that the added freedom given to stations will outweigh the reduction in the opportunities which will remain open to the "networks." We cannot say that there was no such evidence. To take the regulation which is the head and front of the Commission's offending—3.104—it indeed does limit the power of a "network" to furnish large advertisers with the time of all its "affiliates," for it must always run the risk that after its last inquiry a station may have "sold" to another "network" the time which it proposed to "buy" of that station. On the other hand, it is certainly possible that the present contracts give the "networks" so strong a hold upon the industry as to keep down competition which would prove beneficial. Upon such an issue nobody who is not steeped in the details of the business is really entitled to an opinion, and indeed even the opinions of those who are so steeped must be largely speculation. But that does not mean that the industry must be left to itself; the Commission was created precisely to say how far it was best to let things stand, and how far to intervene.

There remains only the question of procedure: whether a motion for summary judgment is proper, or whether, as the plaintiffs argue, the causes should go to trial and be heard upon evidence taken *de novo*. That depends upon what effect we should give to the Commission's findings. If the plaintiffs intervened in a proceding by one of their "affiliates" for the renewal of a license, they could not compel the Commission to reconsider the findings of the report. As we have said, they had had adequate notice and full opportunity to be heard; indeed neither of the complaints alleges that they had not. Upon appeal to the Court of Appeals of the District of Columbia under §402(b), the whole record before the Commission upon the hearings which resulted in the regulations would be part of the record, and the only issues open would be whether there was substantial support for the findings in the record, and whether the findings were "arbitrary or capricious,"

§402(e). That record and those issues are before us here. The plaintiffs did not choose to wait and intervene, but adopted the alternative of an action in equity to "set aside" and "annul" the regulations as "orders." The reason that they have been allowed to proceed in this way is that the regulations inflicted a present injury upon them from which they were entitled to present relief; but the determining issues in each case are the same. Congress, having meant the validity of an order refusing a license to be determined as an appeal upon the record made before the Commission, cannot have meant to allow a larger scope of review because the Commission threatens for the same reasons to refuse all licenses.

This is confirmed by considering what use we could make of any evidence if we took it. It might go to show that the Commission had failed to give adequate notice to the plaintiff of what it proposed, or an adequate opportunity to put in their own evidence, or an adequate hearing upon all the evidence; but aside from the fact that the record is before us and does not bear out such a contention, neither complaint, as we have just said, alleges anything of the kind. On the other hand, if the evidence went to contradict or overthrow the findings, we could not bring it into hotchpot with the evidence taken by the Commission, without deciding the issues in the first instance ourselves. We have no such power; it would upset the whole underlying scheme of an expert commission, whose orders must stand or fall upon such evidence as it had before it. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426. If an aggrieved party wishes to supplement that evidence he must apply to the Commission itself, §405.

The plaintiffs somewhat faintly invoke the doctrine of *Crowell* v. *Benson*, 285 U. S. 22, *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U. S. 349, and *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38. Assuming that that doctrine is still law (*Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573; S. C. 311 U. S. 570), it does not apply. The "networks" are indubitably engaged in interstate commerce and so are their "affiliates;"

it is a question of law, not of fact, whether the regulations are within the Commission's powers, and the only issue of fact, assuming it can be called such, is whether there was evidence to support the findings. Unless the distinction between what is jurisdictional and what goes to the exercise of a power is to disappear altogether, the Commission's jurisdiction did not depend upon whether they rightly estimated the "public convenience, interest, or necessity."

The complaints will be dismissed; and as there has been no trial, we need make no findings. As before, we will grant a stay, this time until February 1, 1943, or until the argument of the appeal in the Supreme Court, whichever is earlier. The same findings which we then made will serve with slight verbal changes. We are filing the judgments, the stays and findings along with this opinion.

Complaints dismissed.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil 16—178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Defendants*.

Order Dismissing Complaint.

Before L. Hand, C. J., and Goddard and Bright, D.JJ.

This cause came on to be heard at the October, 1942 term of this court and was argued by counsel; and thereupon, and upon consideration thereof, it is

ORDERER, ADJUDGED AND DECREED that the complaint herein be, and the same hereby is, dismissed on the merits.

LEARNED HAND,
Circuit Judge.
HENRY W. GODDARD,
District Judge.
JOHN BRIGHT,
District Judge.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil 16—178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Defendants*.

Findings of Fact.

I. That if the Federal Communications Commission, pending the plaintiffs' appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; the plaintiffs will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public intrest.

IV. That a further delay in such enforcement of two and one-half months or until the appeal can be argued

whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to the plaintiffs arising from enforcement, if the conditions mentioned in the First Finding exist.

That the plaintiffs are entitled to a stay pending their appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of February, 1943, whichever is earlier.

LEARNED HAND,
U. S. C. J.

HENRY W. GODDARD,
U. S. D. J.

JOHN BRIGHT,
U. S. D. J.

Decree Granting Temporary Restraining Order.

This cause came on to be further heard at the October, 1942, term of this court and was argued by counsel and thereupon, upon consideration thereof, it appearing that the relief herein granted is necessary to preserve the *status quo* pending an appeal by the plaintiffs to the Supreme Court, for the reasons appearing in the Findings of Fact filed herewith, it is

ORDERED, ADJUDGED AND DECREED that until February 1, 1943, or the argument of the appeal herein in the Supreme Court of the United States, whichever is earlier, the Federal Communications Commission be and the same hereby is restrained from enforcing those regulations which were issued in their amended form on October 11, 1941, and which are known as "Order in Docket No. 5060."

LEARNED HAND,
U. S. C. J.

HENRY W. GODDARD,
U. S. D J.

JOHN BRIGHT,
U. S. D J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 554.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT NATIONAL BROADCASTING COMPANY, INC.

JOHN T. CAHILL,
Solicitor for National Broadcasting Company, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 554.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT NATIONAL BROADCASTING COMPANY, INC.

This is an appeal from a final decree of a statutory three judge District Court for the Southern District of New York dismissing appellants' complaint on the merits.

The suit was brought by National Broadcasting Company, Inc. (hereinafter called NBC), the first nation-wide network organization, and by Woodmen of the World Life

Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, two licensees of radio broadcasting stations, against the United States and the Federal Communications Commission. The purpose of the suit is to set aside an Order of the Commission in so far as it purported to become effective on November 15, 1941, on the ground that the Commission lacks power to make the Order and that the Order is arbitrary and capricious.

The complaint (R. 1) was filed in the District Court of the United States for the Southern District of New York on October 30, 1941, invoking the Court's jurisdiction under the Urgent Deficiencies Act and Section 402(a) of the Communications Act of 1934. Simultaneously with the filing of the complaint, appellants moved for a temporary injunction (R. 221). Appellees did not answer but moved to dismiss the complaint or, in the alternative, for summary judgment (R. 387). On these motions the District Court entered a final decree on February 21, 1942, dismissing the suit for want of jurisdiction over the subject matter, one judge dissenting (R. 470). Upon motion of appellants, the District Court granted a stay of the enforcement of the Order until May 1, 1942 or the argument of the appeal to this Court, whichever was earlier (R. 475).

An appeal having been taken to this Court, the final decree dismissing the suit for want of jurisdiction was reversed on June 1, 1942 and the cause was remanded for further proceedings (R. 476, 316 U. S. 447). The stay was continued upon terms to be settled by the District Court.

Appellees' motions to dismiss the complaint or, in the alternative, for summary judgment, together with appellants' motion for a temporary injunction, were again argued in the District Court before the same three judges on

October 8, 1942, and a final decree was entered on November 16, 1942, dismissing the complaint on the merits (R. 532). At the same time the District Court granted a stay of the enforcement of the Order until February 1, 1943 or the argument of the appeal in this Court, whichever is earlier (R. 533).

The petition for direct appeal to this Court was filed and allowed on November 25, 1942 (R. 534, 536).

Opinions Below

The opinion of the District Court dismissing appellants' complaint on the merits (R. 522) is not yet reported.

The opinion of the District Court dismissing appellants' complaint for lack of jurisdiction over the subject matter (R. 456) is reported in 44 F. Supp. 688. The *per curiam* opinion of the District Court granting a temporary stay pending appeal from that dismissal (R. 473) is reported in 44 F. Supp. 696.

Jurisdiction

The jurisdiction of this Court is invoked under Section 238 of the Judicial Code, as amended (28 U. S. C., Section 345), providing for the direct review by the Supreme Court of a final judgment or decree of a District Court of three judges under the Urgent Deficiencies Act, approved October 22, 1913 (38 Stat. 219, 220; 28 U. S. C., Sections 41 (28), 43 through 48, inclusive), as extended by Section 402(a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C., Section 402(a)).

This Court noted probable jurisdiction on December 14, 1942.

Questions Presented

The questions presented on this appeal are whether the Federal Communications Commission has the power to promulgate the Order hereinafter described, whether the Order is arbitrary and capricious, and whether the District Court should have dismissed the complaint on the merits without holding a trial.

Statutes Involved

The scope of the power of the Federal Communications Commission is specified in the Communications Act of 1934. The provisions of that Act pertinent to this appeal are set forth in Appendix A to this brief. They are:

Sections 3(h), 3(p), 4(i), 4(j), 301, 303, 307, 308, 309, 310, 311, 312, 313, 314, 319, 326 and 602(d).

Appellants also rely upon the First Amendment (which is read into the Communications Act of 1934 by Section 326 of that Act) and upon Article I, Section 1, of the Constitution of the United States.

Statement

On May 2, 1941, the Commission issued its Report on Chain Broadcasting (R. 29), together with its original Order (R. 127) in proceedings entitled: "In the Matter of the Investigation of Chain Broadcasting, Federal Communications Commission, Docket No. 5060." On October 11, 1941, the Commission issued its Supplemental Report

(R. 201), together with amendments to its original Order (R. 213).

A chronological history of the Order since its promulgation on May 2, 1941, together with the text of the Order in its various stages, is set forth in Appendix B to this brief for the convenience of the Court. As there indicated, the Order has never been effective as to existing contracts and has been wholly suspended since November 12, 1941, either by action of the Commission or by court order.

The Order, as originally promulgated and as amended, deals with substantially every important business aspect of network broadcasting and promulgates eight regulations which the Commission seeks to make determinative of all future proceedings for the issuance or renewal of standard broadcast station licenses.

Two of the regulations, 3.106 and 3.107, seek to effect the forced disposition of certain stations licensed directly to NBC and other network organizations (regulation 3.106) and the forced disposition by NBC of either its "Red" or "Blue" network (regulation 3.107).* These two regulations assert a jurisdiction to compel divestiture equalled only by the power delegated to the Securities and Exchange Commission by the Public Utility Holding Company Act of 1935.

---

* There are four national network organizations: National Broadcasting Company, Inc., Blue Network Company, Inc. (both companies being wholly-owned subsidiaries of Radio Corporation of America), Columbia Broadcasting System, Inc., and Mutual Broadcasting System, Inc. Blue Network Company, Inc., was organized after the commencement of this suit to operate the "Blue Network" formerly operated by National Broadcasting Company, Inc. (R. 365). In addition there are numerous regional networks. A regional network is a network which covers only a part of the country.

The Communications Act of 1934 gives the Commission no jurisdiction whatever over network organizations. The stations owned by network organizations are licensed by the Commission but the network organizations themselves are not.

As was pointed out on the previous appeal in this case, part of regulation 3.106 can also be reviewed in a licensing proceeding. The rest of regulation 3.106 is tied in with regulation 3.107 which has been suspended indefinitely subject to being made effective on not less than six months' notice, and is therefore not reviewable here. Appellants' complaint is, consequently, primarily directed to the remaining six regulations, which purported to become effective on November 15, 1941. Both regulation 3.106 and regulation 3.107, however, serve to demonstrate the extent of the jurisdiction sought to be asserted by the Commission.

The remaining six regulations, 3.101-3.105 and 3.108, are directed at the contracts between network organizations (such as NBC) and the licensees of approximately 600 independently owned and operated standard broadcast stations (such as the co-appellants) pursuant to which network broadcasting is conducted.

These six regulations do not deal with the contracts directly, but seek to effect a drastic revision of them by indirection. Each of the six regulations provides that no license shall be granted to a standard broadcast station having a contract with a network organization containing any of the provisions which the Order seeks to prohibit.

The most bitterly contested substantive issue in this case centers around regulation 3.104, which would prevent any licensee of a standard broadcast station from granting an option for any period of its broadcasting time to a network organization.

Two Commissioners dissented throughout on the grounds that the Commission is without power to adopt the regulations and that some of the contract provisions prohibited by the regulations are essential to network broadcasting (R. 151, 215).

Chain or Network Broadcasting

Radio broadcasting in other countries is operated by the government and is supported by taxation (R. 226). In this country radio broadcasting is not a governmental enterprise and is supported wholly by advertising (R. 41, 227).

Standard radio broadcasting in the United States is conducted by approximately 900 standard broadcast stations scattered throughout the nation, each of which is operated under a license from the Federal Communications Commission. Most stations maintain a continuous schedule of programs throughout the broadcasting day, which generally covers sixteen to eighteen hours (R. 227).

Programs may be commercial programs, paid for or sponsored by advertisers, or they may be what are called "sustaining" or non-sponsored programs, which are furnished by the broadcasters themselves in order to provide a continuous program service, to furnish the public with programs not adapted for commercial sponsorship, and to create good will (R. 228, 237).

Each standard broadcast station transmits, and the public receives, local programs, both commercial and sustaining. In the vast majority of localities the public has come to demand and expect programs of a quality and variety which cannot be produced with the limited talent and monetary resources available for broadcasts of local origin. Requisite talent is available only in the great talent centers of the nation, such as New York, Chicago, Hollywood and Washington. In general, only national advertisers possess the monetary resources necessary for the production of high quality commercial programs (R. 40, 229-230). In general, only nation-wide network organiza-

tions possess the monetary resources necessary for the production of a continuous schedule of high quality sustaining programs (R. 40, 229-230). Radio broadcasting has thus come to be preeminently a national medium of expression and a very substantial part of the revenue available to radio comes from national network advertisers (R. 40, 229-230).

The markets of national advertisers span the nation. Advertising experience shows that simultaneous circulation in those markets is necessary to obtain the maximum effect from a given commercial program. For that reason the ability of nation-wide network broadcasting to attract financial support from national advertisers is dependent upon its ability to cover the entire nation at the same instant (R. 229-233). It is this factor that gives to network broadcasting its unique usefulness and functions enabling it to subsist in stiff competition with a variety of other advertising media (R. 229-233).

No individual standard broadcast station can be heard over a sufficient area to effect simultaneous nation-wide circulation. Such circulation can be obtained only from the cooperation of many and far-flung separate radio stations for the conduct of network broadcasting. This is attained in the United States through a widespread system of contracts (known as "affiliation contracts") between a network organization and the licensed operators of independent standard broadcast stations (known as "affiliates") (R. 5-8, 232).

A network organization is essentially a program production and distribution agency. It is the central agency enabling a large number of individual stations operated by independent licensees to furnish a national service although it operates relatively few stations itself. For example,

the NBC network as of April 1, 1942 was composed of 128 stations, of which only 6 were owned by NBC.*

The studios of a network organization are connected with the stations owned and operated by its affiliated licensees by special telephone lines over which a particular commercial or sustaining program is distributed to the individual stations (R. 229). Because of the speed with which electricity travels, a program transmitted from a single point over these wirelines can reach all connected stations simultaneously.

As is explained below, the simultaneous broadcasting of the same program by all stations which receive it can only be ensured by contract.

Development of the Affiliation Contract

In 1926 NBC was incorporated as the first network organization. From its inception NBC has shouldered the major responsibility, as between NBC and the licensees of the standard broadcast stations connected with it by wirelines, for the development and continuance of network broadcasting by assuming wireline costs, by furnishing the stations on the network with a continuous schedule of high quality sustaining programs, by undertaking to sell the time of the stations on the network for nation-wide commercial programs, and by expending money in the further development of the art of radio broadcasting and network broadcasting (R. 70, 75-6, 230-231, 234-235). This has involved heavy financial commitments and expenses on the part of NBC (R. 234-235, 237).

Prior to 1935 NBC had scheduled network programs without formal written contracts with the operators of the

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* Hearings before Committee on Interstate and Foreign Commerce on H. R. 5497, 77th Cong., 2nd Sess. (1942), p. 182.

stations on the network. The continuance of its network broadcasting was seriously endangered by increasing difficulties, occasioned by the development and growing popularity of radio broadcasting, both local and national, in obtaining assurance that such programs would be broadcast by the stations at the time contracted for by the advertisers. After intensive study of the problem NBC, in 1935, entered into written affiliation contracts. The terms of the NBC affiliation contracts are described in the complaint (R. 7) and a form of contract is annexed to the complaint as Exhibit A (R. 18).

The typical affiliation contract provides that NBC will furnish the individual station licensee with a full schedule of sustaining programs and pay the cost of the special telephone lines, and that the proceeds from the sale of network time to advertisers will be apportioned between NBC and the station licensee. The individual station licensee, on the other hand, grants to NBC an option to sell certain specified periods of time, totaling 8½ out of 16 to 18 hours per day, except west of Denver where differences in time require that the option cover the broadcasting day. The option must be exercised by NBC at least 28 days before the program is to be broadcast. This clause, known as the option time clause, alone makes it possible for NBC to guarantee simultaneous nation-wide network circulation.*

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* The traditional exclusive arrangements between network organizations and licensees of the independent stations on the network were reflected in some of the NBC affiliation contracts. Those arrangements were based upon the need to protect the heavy expenses of network services, which increase the good will of the stations receiving them, contribute to the stations' circulation, and make the stations more valuable to both local and national advertisers. NBC found such arrangements no longer essential to its network broadcasting

Appellants regard option time as vital to the continuance of nation-wide network broadcasting. Unless national advertisers have the assurance of requisite circulation which option time alone enables NBC to give them, it would not only be impossible to schedule nation-wide commercial programs but the economic support of the sustaining and public service programs furnished by NBC would disappear.

Each affiliated licensee is separately engaged in scheduling its daily complement of local programs. NBC is at the same time engaged in scheduling a daily series of network programs to be broadcast by the stations of the affiliated licensees, which in some cases number a hundred or more. In the absence of some provision enabling the network to arrange for guaranteed periods of time on the connected stations, it is inevitable that conflicts in time commitments between the network schedule and the schedule of one or more stations will arise (R. 235-236).

The network must, however, be able to assure the national advertisers of simultaneous national circulation. This is necessary to attract an advertiser to radio in the first instance and also to induce him to embark upon a particular advertising campaign. Without the continuing certainty that simultaneous nation-wide circulation will be available when wanted, neither network nor advertiser could afford to enter into commitments for the expensive

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and discontinued them, the last of such provisions being deleted in 1941 (R. 362). Columbia Broadcasting System, Inc. and a number of regional networks, on the other hand, still find them essential to their operations (R. 73, 65).

The fact that option time clauses were adopted at a time when network broadcasting was conducted upon an exclusive basis, however, should effectively negative the contention that option time was adopted as a competitive measure against other network organizations.

and varied talent necessary to produce network programs (R. 235-236).

The failure of a single station located in a market indispensable to an advertiser or of a sufficient number of less important stations to broadcast a particular program, or uncertainty whether such stations would broadcast the program when offered, would cause the advertiser to withdraw and would defeat the desire of all of the other affiliated station licensees to carry the program (R. 235-236). This in turn would not only deprive the public of a nation-wide network broadcast but it would also deprive the network organization of the economic support necessary to its other services.*

On the other hand, it should be noted that the NBC option time provision does not cover the whole broadcast day (except west of Denver where time differences require that the option cover the broadcasting day) but instead divides the day into time subject to network option and time wholly free for local programs. In addition, each station is free to schedule programs in the time covered by the option, subject only to the exercise of the option on 28 days' notice. The NBC option time provision thus goes

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* The matter is not one of mere rapid communication between networks and affiliates, as the Government has urged. It is the continuing certainty that nation-wide circulation will be available when wanted that is essential.

The Government points to the fact that NBC communicates with its affiliates before signing a contract with an advertiser and that the contract with the advertiser provides for the *pro rata* reduction in total charges if one or more stations refuse or are unable to carry the network program. This is done in case a station does not approve of the content of the advertiser's program and in case a station has already scheduled a program it deems of greater public service than the commercial program and which cannot be moved. Although refusals for these reasons may deprive the public of a nation-wide network broadcast, such refusals are very infrequent.

only as far as the exigencies of nation-wide network broadcasting require, leaving the stations free to serve their local communities with local programs as well as with network programs.

Blue Network Company, Inc., which operates the "Blue Network" formerly operated by NBC, has affiliation contracts including option time provisions substantially similar to those of NBC.

Columbia Broadcasting System, Inc. (hereinafter called CBS) was organized in 1927 and is the second nation-wide network organization. Originally CBS made firm contracts with the licensees of each station on its network, agreeing to purchase ten specified hours of the station's time per week at the rate of $500 per week per station (R. 72). These contracts caused CBS to suffer heavy losses through its inability to sell sufficient time, and they were replaced in December, 1927, by contracts whereunder CBS received options on certain of the time of the stations of its affiliated licensees. Currently the CBS contracts grant an option to CBS upon fifty so-called converted hours per week (R. 73).

In 1934 Mutual Broadcasting System, Inc. (hereinafter called MBS) was formed by The Tribune Company (which publishes The Chicago Tribune and owns station WGN in Chicago), and R. H. Macy & Co., Inc., the owner of station WOR in New York (R. 62). Starting with a network of four stations MBS attained the status of a nation-wide network in 1936 (R. 63).

Because MBS has taken a position in support of the Order, and because the District Court has attached significance to that fact, it is necessary to point out the differences between nation-wide network broadcasting as conducted by

MBS and nation-wide network broadcasting as conducted by the other national network organizations.

On June 1, 1942 MBS was owned by eight stockholders. The Chicago Tribune, R. H. Macy & Co., and Don Lee Broadcasting System (the licensee of four stations and the operator of a regional network on the Pacific Coast) each owned approximately one quarter of the outstanding shares. The remainder was owned in equal amounts by Yankee Network, Inc., the licensee of four stations and the operator of a regional network in New England; United Broadcasting Company, the licensee of three stations in Ohio; the Cincinnati Times Star Co., the licensee of a station in Cincinnati; Buffalo Broadcasting Corporation, licensee of a station in Buffalo; and Western Ontario Broadcasting Co., Ltd., the owner of a station in Windsor, Canada.* Since that date several additional stockholders have been added.

MBS conducts nation-wide network broadcasting without assuming the responsibilities and liabilities of a network organization such as NBC and CBS. Although MBS does arrange for the sale of network time to advertisers, it has not, with rare exceptions, assumed wireline costs, nor has it assumed the obligation of furnishing a continuous schedule of sustaining programs to the station licensees affiliated with it (R. 62-64, 76, 79). Most of the MBS sustaining programs are furnished by WGN and WOR, behind which stand The Chicago Tribune and R. H. Macy & Co., whose assets far exceed those of NBC or CBS and are not dependent upon the fortunes of network broadcasting. As a network organization, MBS is little more than a switchboard for the routing of the programs of its stockholders

* Hearings before Committee on Interstate and Foreign Commerce on H. R. 5497, 77th Cong., 2nd Sess. (1942).

and affiliates and network programs to the stations on the MBS network.

In addition, the powerful stations and regional networks which are stockholders of MBS are sufficient to form a sizable nation-wide network by themselves. Being stockholders and as such having a direct financial interest in the prosperity of MBS, the component parts of MBS are very unlikely to refuse to take MBS programs because of time conflicts or for any other reason. Contracts granting an option on the time of the stations are very much less necessary if the stations are also stockholders. This is not the case with NBC or CBS but it is with MBS. Nevertheless MBS adopted option time in 1940. The regional networks comprising MBS, as well as other regional networks, have found options on the time of the stations of their affiliates essential to their operation.

Affiliation contracts containing provisions for the optioning of time of independent standard broadcast stations, i.e. of stations neither controlled by nor financially interested in the network, are the essence of network broadcasting as presently conducted. The NBC contracts represent a careful and delicate balance between the autonomy of the independent local station licensee in rendering both a local and a national service and the dependence of the national service upon simultaneous nation-wide circulation.

Network Program Service

For less than $10 and at the push of a button the humblest citizen of the United States has at his command, day in and day out, the best cultural, educational, informative and entertaining programs the nation affords, and a continuous service of news, news commentaries and public

discussion. The horizon of every home in which there is a radio set has been incalculably broadened by the achievement of network broadcasting in producing and distributing programs of a quality and variety that cannot be obtained from local sources. This in turn has been made possible only through the achievement of network broadcasting in tapping the resources of national advertisers.

It is a fundamental misconception to assume that the network organizations are in possession of a continuous supply of programs which they can distribute to the nation at will. The truth of the matter is that there is a continuous supply of programs only because of the system of contracts developed between individual station licensees and the network organizations enabling them to respond to the needs of a national radio service. Without this system, of which option time is the keystone, radio would not be able to convert the money which national advertisers have to spend into the program service received by the American people today, which is admittedly the finest in the entire world.

The network organization is not like a manufacturer of a product who can make the product and then as a separate transaction distribute it in the manner which suits him best. Network broadcasting is wholly dependent upon the system of contracts outlined above to obtain its product, namely, programs. Unless the requisite national circulation can be guaranteed to the national advertiser he will not use network broadcasting as an advertising medium. He will not make available his program and the network organization will not obtain the money to spend on sustaining programs.

Although only one-third of the total radio broadcasting time in America is paid for directly by advertisers, this

one-third supports the wide variety of public service and sustaining programs covering the remaining two-thirds of the broadcast day. Critics of the daytime serials must be reminded that commercial programs include the Metropolitan Opera and other outstanding programs of classical music, entertainment programs of the finest quality, news broadcasts and news analyses by the highest ranking experts.

They must also be reminded that without the commercial programs the many and varied sustaining programs would not exist—programs such as the NBC Symphony Orchestra under the direction of Arturo Toscanini, the National Radio Forum, the University of Chicago Round Table Discussion, America's Town Meeting of the Air (R. 237), round-ups of world news transmitted by short wave from special correspondents stationed in virtually every important city in the world and throughout the war zones, and the various news broadcasts scheduled by NBC in addition to those which are sponsored (R. 405-410). Before the participation of the United States in the war NBC maintained its own news correspondents in twenty-six foreign countries, including the cities of London, Singapore, Shanghai, Chungking, Vichy, Berlin, Rome, Tokio, Stockholm, Berne, Cairo, Helsinki, Ankara and Buenos Aires (R. 407). Such correspondents are still maintained in neutral and allied countries.

The press also has its advertisers, and its comic strips and serial stories which build and hold circulation and thus attract advertisers. These are the economic foundation of a free press. Commercial programs are the economic foundation of a free radio.

Regulation 3.104

It is apparent that the regulation of critical importance to appellants in this suit is regulation 3.104, prohibiting any licensee of a standard broadcast station from granting an option for any period of its broadcasting time to a network organization. As promulgated on May 2, 1941, regulation 3.104 was a flat prohibition against such an option. The regulation was premised upon the hypothesis that because available standard broadcast stations are limited, and since all users of radio time cannot at once have an option upon the same period of time of a station in a locality where stations are few, the preservation of competition requires that no one have such an option.

Forbidding the station licensees to grant options to any one would be the death knell of the present system of nation-wide network broadcasting. As stated by the dissenting Commissioners, Craven and Case:

> "It is axiomatic that unlimited availability of the few existing radio facilities and efficient national program distribution cannot both be attained at the same time." (R. 152)
>
> "* * * the Commission need not and should not promulgate rules the effect of which would destroy all existing systems, merely to provide some other private enterprise with an opportunity to capture the revenues of broadcasting." (R. 154)

After the promulgation of the Order on May 2, 1941, the industry pressed upon the Commission the practical exigencies of network broadcasting in a series of conferences. On September 12, 1941, the Commission held a re-

hearing upon the petition of MBS which requested that regulation 3.104 be amended so as to permit options upon certain periods of station time, based upon prior use.

On October 11, 1941, the Commission amended its Order, including regulation 3.104. As amended, regulation 3.104 continued to prohibit a true option on any part of a station's time and invented something the Commission called a "non-exclusive option", exercisable on not less than 56 days' notice.

It is of the essence of an option that it be good against the world, but the so-called non-exclusive option is not good against any other network organization, whether regional or national. The 56-day period of time flagrantly disregards the practical necessities of the advertising business and would seriously disable network organizations in competing with other advertising media. The amendment is intricate and confusing, but it is equally a death blow to nation-wide network broadcasting. The impractical nature of the amended regulation was recognized by Commissioners Craven and Case, who said:

> "* * * Apparently by changing the regulation originally promulgated, the majority intended to recognize the practical business situation in broadcasting. It is our opinion that the new regulation does not accomplish this purpose and that networks in reality secure no substantial option privileges under this regulation. We believe that stations should be permitted to utilize the same option principles as is done in ordinary business." (R. 217)

The sole justification of the majority of the Commission for its refusal to recognize the impossibility of conducting network broadcasting without option time was its insistence

upon attributing an overriding importance to unlimited competition:

> "The Commission has rejected the proposal, suggested but not unqualifiedly recommended in the Mutual petition, to permit a station to option exclusively to one network the particular periods of time utilized by that network for network commercial programs over the station during the preceding year. An exclusive option effectively removes a station from the station-network market with respect to all the time it covers. The Commission believes that such a serious restraint upon competition is inconsistent with the freely competitive system contemplated by Congress in the Communications Act of 1934." (R. 210)

Power Asserted by the Commission

Regulation 3.104 is only one of eight regulations promulgated by the Order. It strikes at the heart of network broadcasting; the remaining regulations blanket the entire field.

The bases upon which the Commission purports to obtain support for the powers assumed by the Order are disclosed by the statements made at various times by the Commission majority and its Chairman. For example, at pages 46 to 47 of its Report the Commission majority appears to base the Order upon the applicability of the anti-trust laws to radio broadcasting:

> "The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. In the ab-

sence of Congressional action exempting the industry from the anti-trust laws, we are not at liberty to condone practices which tend to monopoly and contractual restrictions destructive of freedom of trade and competitive opportunity. *Had we liberty in this regard we should require a very clear showing that such practices or restraints, because of conditions peculiar to the industry, promote the best interests of the listening public.* In any event, preservation of the fullest possible measure of competitive opportunity consistent with furnishing the public adequate broadcasting service is one of the elements to be considered in applying the statutory standard of 'public interest, convenience, or necessity.' "* (R. 82-83)

Further, in characterizing the Order before the Senate Committee on Interstate Commerce, the Chairman of the Commission described it thus:

"Mr. Fly: It is no more a regulation of the freedom of business than a decree of a court. No one has ever asserted, for example, that a decree of a court, breaking down certain restraints of trade, is in itself a regulation of the business. *Yet this is the very sort of decree that a court charged with the duty of interpreting the anti-trust laws by way of equity injunction, would write.*" (Hearings before Senate Committee on Interstate Commerce on S. Res. 113, 77th Cong., 1st Sess. (1941), p. 68.)

However, when pressed with the contention that the applicability of the anti-trust laws to radio broadcasting was a matter which concerned the Anti-Trust Division of

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* All italics in quotations in this brief are supplied unless otherwise noted.

the Department of Justice and the courts and not the Commission, the majority argued that its jurisdiction to promulgate the Order did not depend upon the applicability of the anti-trust laws to radio broadcasting, explaining at page 83 of the Report:

> "While many of the network practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making *the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals.*" (R. 119)

This was further developed in a footnote on page 83 of the Report, as follows:

> "It is not entirely clear just what point the networks seek to make. If the argument they advance is that we cannot deny a license to an applicant on the ground that his practices violate the antitrust laws unless a Federal court has first found the applicant guilty, then they misinterpret our decision. We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent *the maximum utilization of radio facilities in the public interest.*" (R. 119)

The general purport of these and other utterances of the Commission is that the Commission asserts the power

broadly to regulate business practices in network broadcasting according to its own competitive philosophy whether or not such practices violate the anti-trust laws. The Commission majority has plainly stated that it is only necessary for it to find that those practices are contrary to its interpretation of "public interest, convenience or necessity."

The Order is not the result of a licensing proceeding but developed from the industry-wide investigation of all aspects of network broadcasting instituted by the Commission under its Order No. 37, promulgated on March 18, 1938. Neither the investigation nor the Report on Chain Broadcasting nor the Order concerns itself with the particular situation of individual standard broadcast stations. Although the regulations are cast in terms of restrictions upon the issuance of licenses, only regulation 3.106, dealing with the licensing of stations to network organizations, can fairly be said to be concerned with the licensing function. The remaining regulations seek to use the licensing power as a means of enforcing a jurisdiction not contemplated by the statute and the result of the Order is a comprehensive attempt on the part of the Commission to regulate the business enterprise of network broadcasting as a whole.

The issues here raised with respect to the power of the Commission to promulgate the Order and with respect to the arbitrary and capricious nature of the Order have nothing to do with the technical competence of the Commission in passing upon individual license applications and renewals in which power, frequencies and interference between stations are the primary considerations. The Order represents a frolic and detour, as it were, into the field of business practices, competition, and the meaning of the anti-trust laws. This appeal presents the question whether

the Communications Act of 1934 empowers the Commission not only to enter but to blanket this field.

The Anti-Trust Suits in Chicago

It must also be pointed out at the outset that there can be no contention here that the matters complained of by the Commission will remain beyond the reach of governmental correction, if correction is needed.

Soon after this action was brought the Anti-Trust Division of the Department of Justice filed suits in equity in the Federal District Court in Chicago against NBC and CBS with respect to the very same matters which are made the basis for the present Order of the Commission, as will be apparent to the Court from a reading of the complaint in the NBC suit, appearing as Appendix C to this brief. These cases are pending. They are now at issue and have been set for trial on April 12, 1943.

Specification of Errors

The District Court erred:

1. In dismissing appellants' complaint on the merits.

2. In failing to issue the injunction prayed for by appellants.

3. In placing a construction upon the Communications Act of 1934 repugnant to Section 326 of said Act, to the First Amendment to the Constitution of the United States and to Article I, Section 1, of the Constitution of the United States, in order to support the Order sought to be set aside in this suit.

4. In holding that the Federal Communications Commission has the power to promulgate the Order, and in failing to hold, as it should have done, that the Federal Communications Commission has no power to promulgate the Order.

5. In failing to hold that the Order bears no reasonable relation to the standards and objectives of the Communications Act of 1934 and is arbitrary and capricious.

6. In dismissing the complaint without holding a trial to determine the reasonableness of the relation of the Order to the standards and objectives of the Communications Act of 1934.

7. In holding that the Order is not so plainly without support in the evidence taken before the Commission as to be arbitrary and capricious.

Summary of Argument

The Communications Act of 1934 provides for the direct licensing of instruments of free speech and Section 326 of the Act reads the First Amendment to the Constitution into the Act. The licensing of instruments of free speech is supportable only in so far as it is necessary to protect clearly defined interests more important than freedom of speech itself.

The provisions of the Communications Act of 1934 dealing with radio broadcasting are virtually a reenactment of the Radio Act of 1927 and are premised upon the need to regulate the physical and technical aspects of radio in

order to prevent the chaotic electrical interference between stations which had developed under the Radio Act of 1912. Neither Act contains any authorization to the Commission to regulate the contractual relationships between licensees of standard broadcast stations and network organizations in any manner whatsoever.

The Commission and the District Court have construed the Communications Act of 1934 as empowering the Commission to regulate these contractual relationships pursuant to the "public interest, convenience or necessity", "larger and more effective use of radio in the public interest," and "equitable radio service to the listeners." The language thus relied upon in support of the Order by the Commission and the District Court does not possess an independent content but can derive meaning only from other and more specific provisions of the Act. A construction of the Act which would give independent content sufficient to support the Order to such vague and general provisions would be repugnant to the First Amendment as well as to Article I, Section 1, of the Constitution of the United States.

The Order is also sought to be supported upon an assumed power on the part of the Commission to regulate business practices in network broadcasting pursuant to its conception of the principles and policies of the anti-trust laws. The clear command of the Act is that the Federal Communications Commission is not to concern itself with the anti-trust laws.

Section 303(i) of the Act empowering the Commission to make special regulations applicable to radio stations engaged in chain broadcasting does not support the juris-

diction asserted. The bare language of this subdivision can also have no meaning separate and apart from its context which relates solely to the physical and technical aspects of chain broadcasting.

The Order would deny licenses to all radio stations having the proscribed contractual relationships without regard to the varying facts of specific licensees and applicants for standard broadcast station licenses. The Commission cannot evade its statutory duty to evaluate and decide each license application on its own facts by promulgating the blanket predeterminations of all cases contained in the Order. It cannot be contended that each contractual provision prohibited by the Order is alone ground for the denial of each and every particular license application.

The extreme power assumed by the Commission and the destructive impact of the Order upon nation-wide network broadcasting and the radio services supported thereby clearly demonstrate that the Order is arbitrary and capricious, and is wholly unrelated to the standards, purposes and objectives of the Communications Act of 1934.

The District Court disposed of the case as upon a quasi-judicial record made before the Commission covering the issues raised in this suit. Such is not the fact. The record made before the Commission was a formless investigation covering many aspects of nation-wide broadcasting not included in the Order and to which the substantial evidence rule cannot be applied. Appellants are entitled to a trial in the District Court on the question whether the Order bears a reasonable relation to the standards and objectives of the Communications Act of 1934.

ARGUMENT

POINT I

The Construction of the Communications Act of 1934 Advanced by the Commission and Adopted by the District Court in Support of the Order is Repugnant to the First Amendment and to Article I, Section 1, of the Constitution.

The most significant single fact about the Communications Act of 1934 and its predecessor the Radio Act of 1927 is that they provide for the direct licensing of instruments of free speech. The Federal Communications Commission holds the power of absolute life or death over every radio station in the United States, each of which is an independent instrument or vehicle of free speech. The basic issue in this case is the scope of the standard pursuant to which the Commission is to exercise this power.

The development of radio has restored communication by speech to the position it had before the invention of the printing press as the most important method of human expression. Although in other countries radio is a government monopoly, supported by taxation, radio broadcasting in the United States is a free enterprise and regulated as such, with the result that our radio service is unequalled throughout the world.

A free radio has become at least as important a part of our heritage as a free press. From its beginnings as a gadget with which only a few people could afford to play in the early 1920's through an intermediate stage when it was regarded primarily as a source of entertainment to a

wider circle of homes, radio has developed into the most important single vehicle for the dissemination of opinion, information, education and entertainment, reaching many more people than the press, including books, magazines and newspapers.

Independent studies show that radio is relied upon for information by far more people than the press. The importance of radio is attested to by the appointment of Elmer Davis, a radio news analyst who for many years had been sponsored by an advertiser on the CBS network, to the chairmanship of the Office of War Information.

The provision of the First Amendment to the Constitution that "Congress shall make no law • • • abridging the freedom of speech or of the press" was embodied by Congress in Section 326 of the Communications Act of 1934 (Section 29 of the Radio Act of 1927) by providing that:

> "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. • • •"

In view of the clear recognition by Congress that the hard-won concepts of freedom of speech and freedom of the press are fully applicable to radio, it cannot be assumed that Congress has legislated with respect to radio without a deep-seated sense of the danger of attempting to regulate radio broadcasting at all. The Communications Act of 1934 must be construed in this light.

It is axiomatic that only clearly defined interests, the protection of which is of greater importance than the pro-

tection of free speech, will support the threat to the freedom of speech inherent in the licensing of the instruments or vehicles of speech.

"The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' (See Wickwar, 'The Struggle for the Freedom of the Press,' p. 15.) While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision." Hughes, C. J., speaking for a unanimous court in *Lovell* v. *Griffin*, 303 U. S. 444, 451 (1938). That case struck down an ordinance requiring a permit for the distribution of pamphlets against the contention that the ordinance was a police measure calculated to keep the streets, gutters and sidewalks of the city clean and was not adopted for the purpose of infringing speech.*

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* See also *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147 (1939); *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496 (1939).

The cases also establish the proposition that even though the interest which the legislature seeks to protect is of sufficient importance to justify a limitation upon the rights of free speech the necessity must be clear. Not only must there be a reasonable relation between unrestricted exercise of the right of free speech and damage to the protected interest, but also a "clear and present danger" of such injury under all applicable circumstances must be affirmatively shown. See *Bridges* v. *California*, 314 U. S. 252 (1941); *Schenck* v. *United States*, 249 U. S. 47 (1919); *Whitney* v. *California*, 274 U. S. 357 (1927); *De Jonge* v. *Oregon*, 299 U. S. 353 (1937); *Schaefer* v. *United States*, 251 U. S. 466 (1920); *Pierce* v. *United States*, 252 U. S. 239 (1920).

The interest sufficient to support the licensing of radio broadcasting in a manner compatible with the First Amendment lies in the sheer physical necessity of preventing destructive electrical interference between stations.

Federal Regulation of Radio

Radio broadcasting is the transmission of electrical energy from a station using a specific frequency to receivers attuned to the same frequency without the aid of physical connection by wire. Two stations cannot be intelligibly received by a radio set within range of both if they broadcast simultaneously upon the same frequency. This problem in radio is known as the problem of interference.

The earliest statute regulating radio was the Radio Act of 1912, which was enacted at a time when radio was primarily used for telegraphic communication and provided for the Federal licensing of transmitters by the Secretary of Commerce. The development of radio broadcasting and the multiplication of radio stations made that Act obsolete, for under it the Secretary of Commerce was bound to grant a license to any applicant and licensees were not required to confine themselves to their allotted frequencies. The result was chaotic interference between stations which threatened utterly to destroy the usefulness of radio. More comprehensive regulation was imperative if radio was to survive.

The Radio Act of 1927 was enacted to meet this need; the powers of the Federal Radio Commission under that Act were transferred to the Federal Communications Commission in 1934. Title III of the Communications Act of 1934, which deals with radio broadcasting, reenacted

without substantial change the provisions of the Radio Act of 1927.

As stated by the District Court, the Commission's powers under Title III of the Communications Act of 1934 are largely set forth in Section 303 (Section 4 of the Radio Act of 1927). Under Section 303 the Federal Communications Commission is vested with comprehensive authority to regulate the physical aspects of the use of the radio spectrum which it is to exercise according to the public interest, convenience or necessity. In addition, the operation of a radio station without a license from the Commission is made illegal by Section 301 and the Commission is required by Sections 307(a) and 309(a) to license applicants for radio facilities upon a finding of public interest, convenience or necessity. Section 307(b) of the Act (Section 9 of the Radio Act of 1927) states that the Commission shall distribute licenses, frequencies, time and power among the different states and communities so as to give fair, efficient and equitable radio service to each.

The Commission's powers with respect to radio broadcasting are thus primarily directed toward the orderly use and allocation of available radio facilities and the orderly development of those parts of the radio spectrum not fully utilized or not yet developed at all. For example, Section 303(g) of the Act provides that the Commission shall "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

Such phrases as "generally encourage the larger and more effective use of radio in the public interest" have purpose and meaning when taken together with their context and the purpose of Congress in creating a Commission to

regulate and license the use of radio facilities. The same is true of the phrase "provide a fair, efficient and equitable distribution of radio service" as used in Section 307(b) with respect to the geographical distribution of licenses, frequencies, hours of operation and power. The same considerations also apply to the guiding statutory standard of "public interest, convenience or necessity."

All this general phraseology either acquires from the manner and place in which it is used meaning sufficient to serve for the guidance of an administrative tribunal, or it lacks such meaning altogether. If the requirements of Article I, Section 1, of the Constitution of the United States are to continue to be observed, and the guaranties of the First Amendment are to continue to be applicable to radio broadcasting, the radio sections of the Communications Act of 1934 must be construed in accordance with the purposes of the Congress in creating this licensing authority, and the general language of the statute must be strictly limited in accordance with its context*.

Statutory Language Relied Upon by the Commission and the District Court is Insufficient to Support the Order

The Communications Act of 1934 contains no provision of any sort giving the Federal Communications Commission jurisdiction over business practices in network broad-

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* *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428 (1935); *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 540 (1935); *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 473 (1940). Compare *N. Y. Central Securities Co.* v. *U. S.*, 287 U. S. 12, 24 (1932). See especially Caldwell, *Freedom of Speech and Radio Broadcasting*, **The Annals of the American Academy of Political and Social Science**, January 1935, at page 194.

casting or in any other kind of broadcasting. The Commission's powers under the Act are directed toward other ends entirely.

In attempting to advance statutory support for its Order the Commission has therefore found itself compelled to disregard the specific statutory provisions actually determinative of this case; to disregard the purposes of Congress in enacting the radio sections of the Communications Act of 1934; and to rely instead upon general phrases, such as the "public interest, convenience or necessity" and the "larger and more effective use of radio in the public interest."

The District Court likewise construed the phrase "public interest, convenience or necessity" as a "standard" and a "rubric" meaningful in itself, upon which the Commission could ring the changes, and relied upon the Congressional admonition that the Commission "generally encourage the larger and more effective use of radio in the public interest." The District Court even went so far as to rely upon the earlier draft of subdivision (i) of Section 303, which would have urged the Commission to promote "equitable radio service to the listeners".*

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* Subdivision (i) of Section 303 provides that the Commission shall "have authority to make special regulations applicable to radio stations engaged in chain broadcasting." The interpretation of this subdivision which its context and purpose requires is discussed in Point II of this brief. The earlier draft relied upon by the District Court provided that the Commission should have the authority:

> "When stations are connected by wire for chain broadcasting, [to] determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting."

The context of "equitable radio service to the listeners" as used in the subdivision clearly refers to technical matters.

To place reliance upon the phrase "public interest, convenience or necessity", the phrase "larger and more effective use of radio in the public interest", and the phrase "equitable radio service to the listeners", as substantive grants of power to the Federal Communications Commission is to fly in the face of the First Amendment and Article I, Section 1, of the Constitution of the United States. Whatever encouragement these phrases may give the Commission in the performance of its clearly defined functions under Title III of the Act, it is a travesty upon statutory construction to take them as meaningful in themselves.

Similar phraseology in statutes regulating public utilities means that the industry is to be regulated as a monopoly. Here the phraseology is advanced in support of an Order designed to increase competition. The point need not be labored. The guaranties of the First Amendment would be weak indeed if the licensing of this important instrumentality of free speech according to such indefinite and subjective standards were supportable.

In *Stromberg* v. *California*, 283 U. S. 359 (1931), a statute forbidding the displaying of a red flag "as a sign, symbol or emblem of opposition to organized government" was held invalid by the Court as an infringement of the right of free speech because the standard was construed to be ambiguous and indefinite. The Court stated:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A

statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside." (pp. 369-370)

See also

Bridges v. *California*, 314 U. S. 252, 260 (1941);
Schneider v. *State (Town of Irvington)*, 308 U. S. 147, 163 (1939);
Near v. *Minnesota*, 283 U. S. 697, 712 (1931).

A simple illustration will demonstrate the fallacy and the danger of construing general language such as that relied upon by the Commission and the District Court as operative apart from its context and unlimited by the purposes of the Act.

Let us assume that the current shortage of wood pulp has severely increased and has resulted in a continuing limitation upon the available supply of newsprint. There is not enough to supply existing newspapers with the amount they have previously used or to enable additional newspapers to be published at will. The future of the press will be in danger unless the available supply of newsprint is allocated in an orderly manner.

Congress, therefore, enacts a statute setting up the Newsprint Allocation Board which is authorized to license the use of newsprint to newspapers according to the public interest, convenience or necessity. The Board is also enjoined, of course, generally to encourage the more effective

use of newsprint in the public interest as well as equitable service to readers. Let us further assume that this Board licenses newspapers throughout the land to use newsprint, pursuant to the public interest, convenience or necessity and having regard to the equitable distribution of newsprint and the amount and quality of available newsprint.

The Board then promulgates an order to the effect that no newspaper shall be licensed to use newsprint if it continues to have a contract with the United Press or with Syndicated Features, Inc. pursuant to which the newspaper receives its national news and its syndicated articles of opinion.

The Board also issues a report urging that the contracts of newspapers with the United Press and Syndicated Features, Inc. violate the principles and policies of the anti-trust laws and are contrary to the public interest. The report states that the more effective use of newsprint and equitable distribution of newsprint to readers means that such contracts must be abrogated.

The departure from the objectives of Congress in creating such a Board, which alone justified any regulation of the press at all, and the direct and unrestricted jurisdiction asserted over the freedom of the press inherent in the claim to regulate the press pursuant to the Board's notions of public interest, convenience or necessity and more effective use of newsprint would be clearly invalid.

This is doubly true because the remedy to correct the alleged contractual abuses lies in the independent enforcement of the anti-trust laws by the Department of Justice and not in expanding the power of the licensor of instruments of free speech. Only by circumscribing the power

of the licensor with the strictness required by the guaranties of the First Amendment can the freedom of the press be preserved. This is not to say, be it noted, that the press is exempt from the application of the principles embodied in the supposed order of the Newsprint Allocation Board. There remains the entirely adequate machinery for the enforcement of the anti-trust laws.

Radio is no less entitled to the protection of the guaranties of the First Amendment than is the press. Freedom of the press has become traditional, but it was established and has been maintained only through a vigilance commensurate with its value to a free people. Congress has stated in Section 326 of the Communications Act of 1934 that this tradition is fully applicable to radio. Ours is the first generation to fight the perennial battle of freedom on this new front. Unless the same vigilance is applied to freedom of radio as former generations applied to freedom of the press, one of our most sacred rights will be lost.

The Claim of Power to Protect Free Speech

The District Court addressed itself to appellants' argument that the power asserted by the Commission is incompatible with the guaranties of the First Amendment as though the argument were that the Order itself was an infringement of freedom of speech, stating:

> "We agree that the regulations might be invalid though they do not prohibit programs on the basis of their contents; *they do fetter the choice of the stations; absolutely free choice would include the privilege of deciding that they preferred the opportunities open to them under the 'networks' contracts to those*

> *which would be otherwise available. The Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment;* we might have to say whether the interest protected, however vital, could stand against constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i. e., the interests, first, of the 'listeners,' next, of any licensees who may prefer to be freer of the 'networks' than they are, and last, of any future competing 'networks.' Whether or not the conflict between these interests and those of the 'networks' and their 'affiliates' has been properly composed, no question of free speech can arise." (R. 529)

The District Court thus not only accepted the vague and undefined nature of the power asserted by the Commission but went on to admit that the Commission directly coerced freedom of speech over the radio. Instead of drawing the only conclusion compatible with the command of the First Amendment—that such a power does not exist—the District Court upheld the power because the Commission proclaimed that it acted in the name of free speech.

It is correct that the Commission in asserting a power fraught with danger to and, in fact, incompatible with freedom of speech, has proclaimed its intention to preserve that basic freedom. Thus we find, in the Commission's Supplemental Report the following statement:

> "The Commission adheres to the views expressed in its Report on Chain Broadcasting. It is of the opinion that the chain broadcasting regulations will

> tend to decentralize the tremendous power over what the public may hear which is now lodged in the major network organizations * * *." (R. 212).*

It is well settled, however, that the First Amendment forbids governmental interference asserted in aid of free speech as well as governmental action repressive thereof.

This fundamental principle is illustrated by *Powe* v. *United States*, 109 F. (2d) 147 (C. C. A. 5th 1940), cert. denied 309 U. S. 679 (1940). In that case defendants were indicted under Section 19 of the Federal Criminal Code (18 U. S. C. A. § 51), which provides in part:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same * * * they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

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* Compare, however, the following, to be found at page 100 of the report to the Commission by the Committee which heard evidence in FCC Docket No. 5060:

> "The Columbia and National networks, which together produced 75,000 sustaining programs in 1938 and, in addition, distributed approximately 50,000 commercial programs produced for them by others to whom they delegated the duty, have operated throughout their existence without any well-defined and comprehensive program policies. Temporary and isolated decisions have been made from time to time by the management of the networks resulting in pronouncements upon social, moral and political policies which sought to follow current thought. At no time during the history of these networks have they defined or indicated a clear path along which their program efforts should move, nor have they done anything other than to establish boundaries within which the networks hoped to operate."

Defendants were charged under that statute with threatening the executive editor of two Alabama newspapers that if he printed editorials exposing certain local lotteries, the defendants would publish an obscene photograph of the editor. The offense alleged was conspiracy to intimidate the editor in the free exercise of his right and privilege as a citizen to publish his views in the newspapers.

The Circuit Court of Appeals for the Fifth Circuit reversed defendants' conviction and remanded the case to the trial court with instruction to sustain defendants' demurrers to the indictment.

The Court based the reversal upon the ground that the First Amendment preventing interference with free speech was not a grant of power to Congress to enact legislation designed to protect it, stating at pages 150-151:

> "The provision there is 'Congress shall make no law * * * abridging the freedom of speech, or of the press.' That the first ten amendments were intended as limitations on the power of the federal government and are not grants of power to it has been established from the beginning. *A flat prohibition against the regulation of a matter in one direction cannot result in endowing Congress with power to regulate it in another direction. This amendment, while regarding freedom in religion, in speaking and printing, and in assembling and petitioning the government for redress of grievances as fundamental and precious to all, seeks only to forbid that Congress should meddle therein.* If Congress can make any law in behalf of these it is because of some power elsewhere expressly granted, or because it is a law necessary and proper to carry out such power."*

* See also *United States* v. *Cruikshank, et al.*, 92 U. S. 542 (1875); *United States* v. *Moore*, 129 Fed. 630 (Cir. Ct. N. D. Ala. S. D. 1904).

In view of the terms of Section 326, the language of the court in the *Powe* case may appropriately be paraphrased to apply to the Commission as follows:

> A flat prohibition against the regulation of a matter in one direction cannot result in endowing the Commission with power to regulate it in another direction. This provision of the statute, while regarding freedom in speaking and broadcasting as fundamental and precious to all, seeks only to forbid that the Commission should meddle therein.

Section 326 expressly provides that:

> "*Nothing in this Act* shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and *no regulation* or condition shall be promulgated or fixed by the Commission which shall *interfere* with the right of free speech by means of radio communication. • • •"

There is a real question, moreover, as to the nature of the Commission's interest in enlarging its powers and "protecting" free speech in view of the dissenting opinion of Commissioners Craven and Case, wherein it is stated, at page 124 of the Report:

> "Some criticisms of broadcasting are erroneously attributed to the fact that most of the licensees are business men. It is claimed that as such, their judgment as to social philosophies is similar. Thus, as a group they are said to reject social and economic philosophies advocated in recent years by some of our more 'advanced thinkers.' Therefore, it is claimed that the broadcasting licensees as a group are rendering to the people of the United States the character of broadcasting which tends to favor one social

philosophy as contrasted to all others and that as a result the existing broadcasting service is not useful in accomplishing desired social improvements. The indisputed facts are that radio broadcasting has been utilized as an open forum. Furthermore, under the American system, the objective has been to render to the public the radio service the public desires rather than to force upon the public the type of service which individuals think the public should have.

"Experience does not justify the conclusion that the limited number of available frequencies should be apportioned to groups of men or to separate organizations who are proponents of particular social philosophies. In fact, such a course might well destroy the general usefulness of radio. It would result in a trend toward the use of radio for a particularized purpose rather than its use in the public interest generally." (R. 160)

This evidence of the intent behind the Order together with the disastrous economic effect of the Order upon network broadcasting shows that the Order is invalid under the doctrine of *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), as well as under the *Powe* case.

POINT II

The Express Provisions of the Communications Act of 1934 Preclude the Power Asserted by the Commission.

The Federal Communications Commission is by no means dependent for enough to do upon the expansively invalid construction of the Act advanced in support of the Order. The Commission has pervasively detailed regula-

tory functions under Title II of the Act with respect to common carrier communications as well as its functions under Title III with respect to radio broadcasting. Under Title III alone the proper discharge of the fundamental purpose of Congress in providing for the orderly allocation of frequencies and power in order to prevent interference between stations calls for the continuous exercise of a technically expert discretion.

Under Section 303 the Commission has the duty to classify radio stations and to prescribe the service to be rendered by each class, the duty to assign bands of frequencies to classes of stations and specific frequencies within the various bands to individual stations, to determine the power, time of operation and location of stations, to provide for experimental uses of frequencies, and a multitude of other regulatory powers vitally necessary to the development and orderly use of the whole radio spectrum.

Under its licensing powers the Commission has charge of the issuance of new standard broadcasting station licenses and the periodic review of over 900 licenses already outstanding. The Commission must also issue licenses in the ever expanding spectrum for the use of ever increasing new facilities, such as the use of short wave, television and frequency modulation. These are the forefronts of the radio art.

With respect to each license application the Commission must exercise a technically expert judgment in connection with the allocation of available facilities and in connection with all matters specified in Section 308(b) as essential to each license application. In addition, the requirements of Section 307(b) that the Commission shall make such distribution of available facilities among the different states

and communities as to give fair, efficient and equitable radio service to each, calls for the exercise of an informed judgment upon many other matters as well.

None of these powers and duties, however, are involved in this case. This appeal involves the validity of the assertion by the Commission of another power, the power to regulate the business of network broadcasting in accordance with its version of the anti-trust laws and to issue "the very sort of decree that a court charged with the duty of interpreting the anti-trust laws by way of equity injunction would write". This power finds no express sanction in the Act, and must find support either in the Commission's licensing authority or in the ninth of the eighteen subdivisions of Section 303 giving the Commission authority to issue special regulations applicable to radio stations engaged in chain broadcasting. These will be taken up in order.

1. The Asserted Power Cannot be Derived from the Authority to License.

Chairman Fly asked a clever question of Mr. Hennessey, counsel for NBC, in oral argument before the Commission. He asked whether the Commission could, with due regard for the public interest, license every station in the United States to one person. Mr. Hennessey replied that he thought it could. The Government has made much of this answer but it has wholly misunderstood its intendment.

The question was asked with respect to the jurisdiction of the Commission to adopt certain proposed regulations similar to those finally promulgated by the Order and equally premised upon the principles and the policies of the anti-trust laws. The answer meant that in so far as considerations of competition and monopoly under the anti-

trust laws were concerned, they were beyond the scope of the power committed to the Commission.

Obviously, considerations other than considerations of competition and monopoly under the anti-trust laws, considerations such as the duty under Section 307(b) so to distribute available facilities among the different states and communities as to give fair, efficient and equitable radio service to each, might require an opposite result. It is also reasonable to construe the legislative history of the Act as evidencing a Congressional intent that too many facilities should not be licensed to one person. Such considerations may evidence a policy against what might be called a "monopoly" of radio licenses, but they do not support the Order.

The desires of Congress with respect to the geographical distribution of available facilities or with respect to the acquisition of too many stations by one person have a conceivable bearing only upon regulation 3.106 which is, as we have said, the only regulation promulgated by the Order which may fairly be said to relate to the Commission's licensing function. The issue in this case, however, is whether the power to license is sufficient to support the indirect regulation of business practices in network broadcasting pursuant to the policies of the anti-trust laws.

In so far as the Commission purports to use its licensing power to deal with restraints on competition or practices tending thereto in network broadcasting, that power must be interpreted in conformity with other sections of the Act, the most important of which are Sections 311 and 313.

Sections 311 and 313

Section 313 expressly makes all anti-trust laws applicable to interstate or foreign radio communications and

provides that when any licensee has been "found guilty" of a violation of such laws in any civil or criminal action brought thereunder, the court may order the revocation of its license, in addition to the penalties prescribed by the anti-trust laws.

This Section is apparently the fundamental basis for the Commission's claim to the power and duty to enforce competition in radio broadcasting according to its theories of the principles and policies of the anti-trust laws. While dissenting from the Commission's claim to power under Section 313, appellants do not want to be understood as claiming that radio broadcasting was not intended to be a competitive industry. The precursor of Section 313 in the Radio Act of 1927 was enacted at a time when Congress thought that the comprehensive regulation of a specific industry might be deemed to exclude that industry from the anti-trust laws. Radio was therefore expressly made subject to the anti-trust laws. No one, after reading the Section, could doubt that radio, like most other industries, is meant to be competitive, and the opinion of this Court in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940), makes this conclusion doubly clear. But it is also clear that Section 313 is directed to the Department of Justice and the courts and not to the Federal Communications Commission. This is made fully apparent in the companion section to Section 313, namely, Section 311.

Section 311 requires that the Commission deny a station license to any person whose license has been revoked by a court under Section 313, and authorizes the Commission to refuse such license to any other person who

> "• • • *has been finally adjudged guilty by a Federal court* of unlawfully monopolizing, or attempt-

ing unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition."

The language of Sections 311 and 313 is clear and specific. It sets forth in detail the conditions under which a Federal court, on the one hand, may revoke a license issued by the Federal Communications Commission, and the conditions under which the Commission, on the other hand, may refuse a license on account of the anti-trust laws and *authorizes the Commission to deny a license on account of the anti-trust laws only after there has been a final adjudication of a violation of those laws by a Federal court.*

Both Sections 311 and 313 of the Communications Act of 1934 were found in the Radio Act of 1927 as Sections 13 and 15, respectively. Section 15 of the Radio Act of 1927 was reenacted verbatim as Section 313 of the Communications Act of 1934. Section 13 of the Radio Act of 1927 directed the Federal Radio Commission to revoke the license of any licensee who had been finally adjudged guilty by a Federal court of violating the anti-trust laws, whether or not the Federal court had itself revoked the license.* As Section 311 of the Communications Act of 1934, however, the Section directs the Federal Communications Commission to

* The full text of Section 13 of the Radio Act of 1927 appears in Appendix D, p. 59. The language here under discussion reads as follows:

"The licensing authority is hereby directed to refuse a station license * * * to any person * * * which has been finally adjudged guilty by a Federal court of unlawfully monopolizing * * * radio communication * * * or to have been using unfair methods of competition."

refuse a license to any person who has been finally adjudged guilty by a Federal court of violating the anti-trust laws only when the Federal court has revoked the license. If the Federal court has not revoked the license, the Commission is not directed but *authorized* to deny the license.

The amendment certainly does not any more empower the Commission to determine whether or not the anti-trust laws have been transgressed than did the original Section, but only empowers the Commission to determine whether a transgression of the anti-trust laws found by a Federal court has any bearing upon the issuance or denial of a radio broadcasting license whereas previously the Commission had no such discretion.

The District Court fell into plain error in dealing with these Sections. It stated:

> "Section 13 of the Radio Act of 1927 had provided that if a court revoked a license, the Commission must refuse to renew it, but it had stopped there; and, as the law then stood, it might perhaps have been argued with some show of plausibility that an applicant's monopolistic or unfair competitive practices in the past were not relevant to the grant of a license". (R. 525)

Section 13 of the Radio Act of 1927 did not read as the District Court stated but instead provided that if an applicant had been finally adjudicated by a Federal court of a violation of the anti-trust laws, the license must be denied whether or not the Federal court had revoked the license itself. The adjudication by the Federal court even though unaccompanied by the revocation of the license was so "relevant" to the grant of a license by the Commission that it precluded the Commission from issuing one.

As they then stood Sections 13 and 15 were in conflict, for there was no point to leaving a discretion in the court not to revoke the license when the Commission was nonetheless required to refuse it. In order to harmonize these Sections the amendment of Section 13 in 1934 directed the Commission to revoke the license only when it had been revoked by the Federal court and merely authorized the Commission to refuse a license if the court had made the adjudication without adding that penalty. The adjudication of a violation of the anti-trust laws by a Federal court was thus made less "relevant" to the grant of a license than it was before.

The fact remains that neither Section 13 of the Radio Act of 1927 nor Section 311 of the Communications Act of 1934 made the anti-trust laws relevant to a licensing proceeding at all until after a violation had been not only adjudged but *finally* adjudged by a Federal court.

If the Commission were held to have jurisdiction under its licensing authority to refuse a license on the basis of its own finding that the applicant had used unfair methods of competition or had been guilty of monopoly or an attempt to monopolize, the express requirement of Section 311 that such applicant must first be "finally adjudged guilty by a Federal court" would be superfluous.

Further, Section 602(d) amends Section 11 of the Clayton Act and expressly confers jurisdiction to enforce compliance with Sections 2, 3 (covering arrangements for exclusive dealing), 7 and 8 of the Clayton Act upon various administrative bodies, including the Federal Communications Commission, as follows:

> "Sec. 11. That authority to enforce compliance with sections 2, 3, 7 and 8 of this Act [i.e., the Clayton

> Act] by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; *in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy;* * * * and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:"

When the foregoing provision is read in connection with Section 3(h) of the Communications Act of 1934 providing that "a person engaged in radio broadcasting shall not in so far as such person is so engaged, be deemed a common carrier", it is obvious that the Communications Act and the Clayton Act have been deliberately framed so as to exclude a delegation of authority under the Clayton Act to the Federal Communications Commission in so far as radio broadcasting is concerned.

That the scope of the Commission's licensing authority is limited and not expanded by Sections 311, 313 or 602(d) should be apparent. It is a well settled rule of statutory construction that when a matter is specifically provided for in a statute a general provision is inoperative with respect to the matter covered specifically. As stated by this Court in *United States* v. *Chase*, 135 U. S. 255 (1890):

> "It is an old and familiar rule that, 'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' *Pretty*

> v. *Solly*, 26 Beavan, 610, per Romilly, M. R.; *State* v. *Comm'rs of Railroad Taxation*, 37 N. J. Law, 228. This rule applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include. Endlich on the Interpretation of Statutes, 560." (p. 260)

See also *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204 (1932).

The leading case discussing the scope of the Commission's licensing authority is *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940). There the licensee of a standard broadcast station appealed from the Commission's action in granting a license for a competing station upon the ground that the Commission had failed to weigh the economic injury which would be suffered by the appellant as the result of competition by the new station licensee. After stating the purpose of the radio sections of the Communications Act of 1934 the Court pointed out that Congress did not subject radio to common carrier regulation, although the financial ability of a licensee to render the best practicable service to its community is expressly made relevant to the licensing authority of the Commission under Section 308(b). The Court went on to say, at page 475:

> "But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.
>
> * * * * * *

> "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. *Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.*"

With this express statement that the Commission was given no jurisdiction over the general economic and business practices in radio broadcasting the Court also stated that the question of competition between a proposed station and an existing station was not to be entirely disregarded by the Commission. That question might have a vital and important bearing upon the economic ability of either station adequately to serve the public.

Since the financial ability of a licensee adequately to serve the public is clearly made relevant to the Commission's licensing authority under Section 308(b), it is obvious that the effect of competition may have a bearing upon that question. This, however, is far from importing concepts of competition and monopoly under the anti-trust laws into the licensing authority. Section 311 is the only section in the Act that could conceivably be said to import any concept with respect to the anti-trust laws into the licensing authority. It permits the Commission to consider monopoly only after a monopoly has been finally adjudicated such by a Federal court. Section 313, on the other hand, providing for the general applicability of the anti-trust laws to radio broadcasting is not directed to the Commission but to the Federal courts.

The statute has so been construed by the Chairman of the Commission himself. In 1940 the Commission was

asked its opinion with respect to the consent decree entered in the District Court of Delaware to which Radio Corporation of America, General Electric Company, Westinghouse Electric & Manufacturing Co., American Telephone and Telegraph Company, and others, were parties. Chairman Fly wrote a letter to Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, in which he stated:

> "The Commission deems it inappropriate for it to comment on the consent decree in the Radio Corporation of America antitrust case. *The reference in the Communications Act to antitrust activity is directed to the courts and the prosecution of such matters is, of course, vested in the United States Department of Justice.*" (Hearings before Senate Committee on Interstate Commerce on the nomination of Thad H. Brown, 76th Cong., 3d Sess. (1940), p. 235).

The reason for requiring a final adjudication by a Federal court before the Commission can revoke or deny a license on the basis of the anti-trust laws or the policies of those laws is clear. It is not because of "the mysteries enveloping an adjudication of 'guilt' under the Anti-Trust laws which make that issue unfit to be entrusted as such to profane hands" as the District Court would have it (R. 527). The point is that the anti-trust laws do not express a policy of unlimited competition that he who runs may read and apply. As stated by Chief Justice (then Mr. Justice) Stone in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940), at page 489:

> "The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and

the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, *the courts have been left to give content to the statute*, and in the performance of that function it is appropriate that courts should interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed."

The substance of the anti-trust laws is largely judge-made law, to be interpreted and applied by the courts according to the limitations thereof, including the rule of reason, under which only *unreasonable* restraints on trade are prohibited.* Not even the Department of Justice itself purports to enforce the anti-trust laws by laying down broad edicts applicable to a whole industry. The whole machinery of the enforcement of the anti-trust laws is based upon the deciding of specific cases by the courts.

Moreover, the remedies provided for in the anti-trust laws have always been construed to be exclusive.** A reference has already been made to the suits in equity brought in Chicago by the Anti-Trust Division of the Department of Justice against NBC and CBS with respect to the very same matters which are made the basis for the present Order of

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* See, e.g. *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1 (1911); *United States* v. *American Tobacco Co.*, 221 U. S. 106 (1911); *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918); *Standard Oil Co.* v. *United States*, 283 U. S. 163, 169 (1931); *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940).

** *Minnesota* v. *Northern Securities Company*, 194 U. S. 48 (1904); *General Investment Company* v. *Lake Shore & Michigan Southern Railway Company*, 260 U. S. 261 (1922); *U. S.* v. *Cooper Corporation*, 312 U. S. 600 (1941); *Thatcher Manufacturing Company* v. *F. T. C.*, 272 U. S. 554 (1926); *Arrow-Hart & Hegeman Electric Co.* v. *F. T. C.*, 291 U. S. 587 (1934); cf. *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U. S. 500 (1936).

the Federal Communications Commission. Appellants are at the very least entitled to a determination of the legality of their business practices by a court pursuant to the rule of reason. *"Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers."* Mr. Justice Douglas in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), speaking with respect to the approval by the Petroleum Administrative Board of practices under the anti-trust laws.

That the interest appellants have of being accorded the safeguards of a judicial trial before a court under the anti-trust laws is not merely academic but of the highest practical importance is apparent from the following statement of the minority Commissioners:

> "The majority appears to conclude that it is necessary to exert control over certain business policies of radio station licensees in much the same manner as has been proven suitable for public utilities other than radio. However, in arriving at this conclusion there appears to have been no weighing of the advantages and the disadvantages of the present broadcast structure in terms of good program service to the public. Hence, no conclusions based upon evidence in the record have been made of the reasonableness of the present practices of the industry. For 14 years, existing contract arrangements have been enforced both through formal and informal agreements, and broadcasting in America has achieved greater progress than in any country in the world. The record does not disclose that there is *unreasonable* restraint of competition resulting from certain contracts which the majority proposes to prohibit." (R. 153)

The Provisions Concerning Transfer of Licenses

Further seeking to import the desired meaning to the licensing authority, the Commission relies upon Section 309(b)(2), providing:

> "(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act."

and Section 310(b), providing:

> "(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

The sections are clearly designed to enable the Commission to pass upon the qualifications of station licensees who become such by transfer rather than by an original application. Otherwise the considerations specified in the Act as relevant to the original issuance of a license could be avoided. These considerations include the financial and technical competence of the applicant, and it may be conceded that these considerations also include the question as to how many stations should be licensed to one person. Certain statements by the sponsors of the Radio Act of 1927 made on the floor of the House and of the Senate (*infra*, pp. 74, 77) indicate an intention that the Commission should allocate available facilities among applicants as well as geographically.

As has been pointed out above, however, the desire of Congress with respect to the allocation of facilities either geographically or among applicants have nothing to do with the principles and policies of the anti-trust laws, although it can be described as relating to "monopoly". Whether called a problem of "monopoly" or by some other name, the number of licenses to be issued to one person is a separate problem which obviously must be dealt with by the Commission and cannot be exclusively committed to the Department of Justice and the courts. The contrary is true of restraints upon competition.

Statutory History of the Licensing Authority

It is not contended by appellants that Congress in enacting the Radio Act of 1927 did not take into account considerations relating to monopoly and restraints of trade under the anti-trust laws. The Act of 1927 and some of the bills leading to its eventual passage were introduced into Congress at a time when there was litigation before the Federal Trade Commission concerning the contracts between American Telephone and Telegraph Company, Radio Corporation of America, General Electric Company, Westinghouse Electric & Manufacturing Company and others relating to patents, and this litigation was brought to the attention of Congress. It is, however, contended by the appellants that the power to make findings of fact and conclusions with reference to monopoly and restraints of competition was specifically denied to the Commission: this is further borne out by the following statutory history.

H. R. 13773, one of the early bills to amend the Act of 1912 introduced in the 67th Congress, 4th Session (1923), contained a provision in Section 2(C) thereof that the

Secretary of Commerce (then the licensing authority) was authorized to refuse a station license to anyone who in his judgment was monopolizing radio communication.*

A similar provision was contained in Section 2(C) of H. R. 7357, introduced in the 68th Congress, 1st Session (1924), save that in H. R. 7357, the Secretary of Commerce was *directed* to refuse a station license to anyone who in his judgment was monopolizing radio communication.**

This bill also contained Section 2(G) (now Section 313 of the Communications Act of 1934), declaring the anti-trust laws applicable to radio communication and providing that a Federal court, upon finding a licensee guilty of monopoly, might revoke the license.†

In the hearings before the Committee on the Merchant Marine and Fisheries with reference to this bill, *Secretary Hoover testified that he disapproved of the section requiring the Secretary of Commerce to make a judgment as to monopoly in radio communication because the determination as to monopoly was a difficult legal question that did not properly belong to any administrative body.* He advocated the procedure requiring the finding of monopoly to be made by a court.††

In H. R. 5589, introduced in the 69th Congress, 1st Session (1925), Section 2(C) was amended so as to provide that the Secretary of Commerce was directed to refuse a station license only to one who had been found guilty by a Federal court of unlawfully monopolizing radio communication.‡‡ *A series of amendments was proposed by*

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* See Appendix D, p. 55.

** See Appendix D, p. 56.

† See Appendix D, pp. 56-57.

†† See Appendix D, pp. 57-58.

‡‡ See Appendix D, p. 59.

*the Congressional minority to give the licensing authority jurisdiction to determine the facts of monopoly. All of these amendments were uniformly rejected.** All subsequent bills and the Radio Act of 1927, as finally passed, required that there be an adjudication of monopoly by a Federal court before the Commission was empowered to refuse a license on the ground of monopoly.

Speaking on July 1, 1926, with reference to H. R. 9971, a successor of H. R. 5589 in the 69th Congress, 1st Session, which contained the above described division of jurisdiction, and which, moreover, contained the provision giving the licensing authority the power to make regulations with respect to chain broadcasting, Senator Dill, the sponsor of the radio bills in the Senate, stated on the floor of the Senate:

> "Mr. Dill: The bill provides that in case anybody has been convicted under the Sherman anti-trust law or any other law relating to monopoly he shall be denied a license; *but the bill does not attempt to make the commission the judge as to whether or not certain conditions constitute a monopoly; it rather leaves that to the court.*" (Cong. Rec., Vol. 67, Part 11, p. 12507.)

When H. R. 9971 was reported out of a committee of conference of the Senate and House in the 69th Congress, 2nd Session, Senator Dill then answered an inquiry by Senator Pittman as follows:

> "Mr. Pittman: I understand; but *it is evident that the House did not intend that the commission to be appointed under this bill should have the determination of the question as to whether there was a*

* See Appendix D, pp. 60-64.

monopoly existing or whether there were overcharges or whether there were discriminations, and the reasons why they expressly left that out was because there were two bodies, each dealing with those subjects.

"Mr. Dill: *The Senator is correct in that.*" (Cong. Rec., Vol. 68, Part 3, p. 3034.)

If the interpretation Senator Dill put upon his bill in the foregoing statements upon the floor of the Senate be not sufficient to disclose Congressional intent, the amendment which he offered in the 73rd Congress, 2nd Session (1934), to S. 3285, one of the bills leading to the Communications Act of 1934, makes it abundantly clear.

After that bill had been reported from the Committee on Interstate Commerce, and there had been some debate upon it, Senator Dill offered the following amendment to Section 307 on the floor of the Senate:

"(f) In granting applications for licenses or renewals of licenses for frequencies to be used for broadcasting, the commission shall so distribute such licenses that no licensee nor organization of licensees, whether effected by purchase, lease, chain broadcasting, or other method, shall be able to monopolize or exercise dominant control over the broadcasting facilities of any community, city, or State, or over the country as a whole, and the commission shall, so far as possible, by its distribution of licenses, provide for broad diversification and free competition in broadcast programs to be presented to radio listeners." (Cong. Rec., Vol. 78, Part 8, p. 8851.)

In connection therewith Senator Dill made the following statement:

"Mr. Dill: The purpose of the amendment is to make it impossible for any one man or organization to have control of the broadcasting facilities of a community, State, or the country if there are other applications from responsible applicants. At the present time there is growing up in many cities the practice of the owner of an important station leasing the facilities of another important station and then organizing a corporation to control a third station, and as a result the one station gets complete control of the broadcasting of the community. The purpose of the amendment is to give the commission a reason, if there be a suitable applicant, for granting a license to another applicant and to break up that kind of practice if the commission shall find it necessary. It is a permissive amendment." (Cong. Rec., Vol. 78, Part 8, p. 8851.)

This amendment was agreed to and the bill was passed by the Senate. Upon the enactment of a *different* bill by the House there was a conference and in the conference report is found the following statement:

"The substitute bill agreed to in conference omits the paragraph of the Senate bill no. 307(f), which carried a new provision requiring the Commission to distribute broadcasting licenses so that no one licensee or organization of licensees should exercise dominant control over the broadcasting facilities of any locality." (Cong. Rec., Vol. 78, Part 10, p. 10987.)

The significance of the rejection by Congress of this amendment proposed by Senator Dill becomes apparent when the power asserted by the Commission is compared with the power denied to it by the rejection of this amendment.

2. The Asserted Power Cannot be Derived from the Authority to Make Special Regulations Applicable to Radio Stations Engaged in Chain Broadcasting.

The Government attempts to override all objection to the validity of the Order as exceeding the Commission's licensing authority by calling attention to the ninth of eighteen subdivisions of Section 303.

Subdivision (i) of Section 303 provides that the Commission shall "have authority to make special regulations applicable to radio stations engaged in chain broadcasting." When this subdivision of Section 303 is read in connection with the others, it appears that Section 303 in its entirety relates solely to the technical problems of the radio broadcasting art. The general language of subdivision (i) cannot be interpreted at variance with its immediate context.

Section 303 in its present form can best be understood by reviewing its textual development. In hearings before the Committee on Merchant Marine and Fisheries of the House of Representatives on H. R. 7357, a bill to amend the Act of 1912 introduced in the 68th Congress, 1st Session (1924), Secretary of Commerce Hoover testified that at that time his Department had the impossible task of attempting to police 20,000 radio stations in the United States.* It was to deal with the technical problems of interference resulting from such a mass of broadcasting stations that H. R. 5589, another precursor of the Radio Act of 1927, introduced in the 69th Congress, 1st Session (1925), provided in Section 1(B)** thereof that the Secretary of Com-

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* See Appendix D at pp. 57 and 58.

** The textual development of Section 303 of the Communications Act of 1934 is set forth at pp. 64-71 of Appendix D.

merce, as public convenience, interest or necessity required, should:

classify radio stations;

prescribe the nature of the service to be rendered by each station;

assign bands of frequencies or wave lengths to the various stations;

determine the power which each station should use and the time during which it should operate;

determine the location of stations and the kinds of instruments to be used;

regulate the purity and sharpness of emissions from each station;

establish areas or zones to be served by any station;

inspect licensed stations and their apparatus;

make such regulations as are deemed necessary to prevent interference between stations and to carry out the provisions of the Act.

The substance of this Section 1(B) of H. R. 5589 appears in Section 4 of the Radio Act of 1927, save that the power to inspect stations was omitted and the Radio Commission (substituted for the Secretary of Commerce as the licensing authority) was given further authority:

to make special regulations applicable to radio stations engaged in chain broadcasting;

to make general rules and regulations requiring stations to keep records of programs, transmissions of energy, communications or signals;

to exclude from the requirements of any regulations any radio stations upon railroad rolling stock;

to hold hearings.

Section 4 of the Radio Act of 1927 is substantially incorporated in Section 303 of the Communications Act of 1934, save that the authority to hold hearings is no longer contained in this part of the Act and the Communications Commission (substituted for the Radio Commission) was given the further authority (most of which was held by the Federal Radio Commission under Section 5 of the 1927 Act):

to study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

to prescribe the qualifications of station operators and to classify them according to duties to be performed;

to suspend the license of any operator if he had done certain things;

to inspect transmitting apparatus;

to designate call letters of all stations;

to publish such call letters and other announcements and data;

to require the painting and/or illumination of radio towers if the Commission deemed that they might constitute a menace to air navigation.

Section 303 of the Communications Act of 1934 was amended in 1937 to expand the conditions under which an operator's license could be revoked, to expand the inspec-

tion provisions and to give the Commission power to make such rules and regulations as might be necessary to carry out provisions of the Act or any international radio treaty.

It is apparent that Section 303 as a whole is intended to supplement the licensing power by giving the Commission authority to ensure the orderly use of the available frequencies by rule, regulation, classification or otherwise.

To seize upon one subdivision of a long and particularized section relating to technical and physical matters, enacted for the guidance of a Commission expert in that field, and use that subdivision as a justification for the making over of the entire radio broadcasting system of the United States, not even upon technical or physical grounds but upon ill-considered notions as to the regulation of business practices, is a patent usurpation of power.

This is made even more apparent by the fact that subdivision (i) refers to *stations*, not to licensees. It is obvious that power to regulate the contracts of licensees of standard broadcast stations according to the dictates of theories of competition cannot be premised upon authority to make special regulations applicable to the physical *stations*.

The authority to make special regulations applicable to radio stations engaged in chain broadcasting is subject to the same difficulties under the First Amendment as the phrase, "public interest, convenience or necessity" or "larger and more effective use of radio in the public interest." If the bald words of the subdivision may be said to authorize the chain broadcasting regulations on their face, as the Commission claims, they equally authorize regulations dealing directly with network programs.

A regulation stating that no license will be issued to any standard broadcast station engaged in chain broadcasting should it broadcast programs of political discussion would obviously be a special regulation applicable to radio stations engaged in chain broadcasting. It would equally obviously not be supported by Section 303(i).

Legislative History of Section 303(i)

The major concern of Congress arising from the problems of interference which resulted from the deficiencies of the Act of 1912 was to relieve congestion. The problem was not only one of numerical congestion but one of conflicting use of the same wave lengths and of relative power. The receiving sets then in use were not well adapted to selecting the desired station and tuning out others, and the powerful stations were likely to drown out less powerful stations over a wide sector of the dial. There was considerable fear that a claim of vested rights to the wave lengths and power then used by broadcasters might thwart the Congressional objective of an orderly use of the air. Although this fear often expressed itself as a fear of "monopoly," it is important to recognize that it was a fear lest the chaotic state of the air be made an unchangeable *status quo*, and it was not a question of restraints upon competition.

Much of the Congressional discussion about "monopoly" in the radio broadcasting field had to do with this aspect of the problems of interference, and the power to deal therewith was granted to the Commission by declaring that there were no vested rights in the air and by giving the Commission the power to license and allocate frequencies and wattage in an orderly manner. Compare *Federal Com-*

munications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940):

> "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses. Licenses were not to be granted for longer than three years. Communications Act of 1934, Title iii, §307(d). No license was to be 'construed to create any right, beyond the terms, conditions, and periods of the license.' *Ibid.*, §301. In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority." (pp. 137-8)

The development of chain broadcasting beginning in 1924 gave rise to a new accentuation of the same problem. The high-power stations, although geographically separated, were operating upon a variety of wave lengths, and, due to the unselective nature of the receivers then existing, these high-power stations were likely to be the only ones that could be heard wherever the dial was turned. Because there were few high-power stations, and because there was only one organization distributing programs over wirelines, these stations were all likely to be carrying the programs of that one network, and the radio audience could often hear nothing else. Thus in many areas high-power stations were blanketing more than one sector of the dial with programs which were duplicates of each other. The idea was current that it might be possible to deal with the

special problems of interference connected with this early chain broadcasting by assigning special frequencies to stations engaged in chain broadcasting or in some similar manner.

In hearings before the Senate Committee on Interstate Commerce on S. 1754, introduced in the 69th Congress, 1st Session, 1925, Senator Dill raised the problem of chain broadcasting for the first time in a question to Stephen B. Davis, Jr., Solicitor of the Department of Commerce:

> "Senator Dill. I want to ask Judge Davis a question about another subject not covered in this bill, but which I want to have considered; and that is the subject of chain broadcasting. During the past few months there has grown up a system of chain broadcasting, extending over the United States a great deal of the time. I say a great deal of the time—many nights a month—and the stations that are connected are of such widely varying meter lengths that *the ordinary radio set that reaches out any distance is unable to get anything but that one program, and so, in effect, that one program monopolizes the air. I realize it is somewhat of a technical engineering problem*, but it has seemed to many people, at least many who have written to me, that when stations are carrying on chain programs that they might be limited to the use of wave lengths adjoining or near enough to one another that they would not cover the entire dial. I do not know whether legislation ought to restrict that or whether it had better be done by regulations of the department. I want to get your opinion as to the advisability in some way protecting people who want to hear some other program than the one being broadcast by chain broadcast."

The whole colloquy between Senator Dill and Stephen B. Davis, Jr., is set forth at pages 72-74 of Appendix D to this brief. Thereafter the Senate Committee on Interstate Commerce reported out H. R. 9971 which added to the power of the Radio Commission in what was to become Section 4(h) of the Radio Act of 1927 (and subsequently Section 303(i) of the Communications Act of 1934), the authority:

> "When stations are connected by wire for chain broadcasting, [to] determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting."

This language was reported by the Senate Committee on Interstate Commerce (Report No. 772, 69th Cong., 1st Sess., p. 3) as "complete authority • • • to control chain broadcasting". That this complete authority was technical in nature is apparent from the wording of the amendment, its context, and the fact that it refers not at all to licensees but to *stations*, power and wave lengths.

Evidently from the recognition that much of the wording of this amendment was superfluous in that the whole of Section 4 of the 1927 Act (Section 303 of the present Act) dealt with power of stations, wave lengths and other physical characteristics, it appeared in Section 4(h) of the Radio Act of 1927, as finally passed (now Section 303(i) of the Communications Act of 1934), as authority "to make special regulations applicable to radio stations engaged in chain broadcasting."

Whether or not the Congress thought that the general rule that regulations must have uniform application required that the Commission be given power to make "special" or different regulations applicable to radio stations engaged in chain broadcasting, it is apparent that the subdivision relates solely to technical problems of radio broadcasting which are special to chain broadcasting. Although Section 303(i) has been a part of the law governing radio broadcasting since 1927, there has been no previous attempt to construe it otherwise.

Indeed, in so far as the problem of high-power stations blanketing out less powerful stations is concerned, shortly after the enactment of the Radio Act of 1927 improvements in the selectivity of radio receivers and the Commission's allocation of frequencies and power under its licensing authority so reduced interference between stations that this problem was effectively taken care of without the use of Section 303(i).

The other problem sought to be dealt with by Section 303(i) was the problem of more than one station sending the same program to the same area, or the problem of duplication. The Commission devoted considerable time in its hearings in Docket No. 5060 to the question of the duplication of network programs, that is, the same network program being heard on different parts of the dial from a number of stations located at various points. The Commission was unable to reach any conclusion thereon. At page 50 of the Report of the Committee which summarized the evidence in Docket No. 5060 for the Commission, it is stated:

"2. Duplication of Programs

"The charts in the preceding subsection also show that there is a certain amount of duplication

of network program service—i.e., transmission of the same program in the same area by two or more outlets of the same network organizations. Network program duplication obviously should be held to a minimum. But the extent to which such duplication now exists is not entirely clear. Because of the extremely technical nature of this entire question, it is impossible to draw any conclusion at this time, and the subject should be investigated further."

The Legislative History Relied Upon by the Commission

The foregoing history and analysis of the Communications Act of 1934 and of the Radio Act of 1927 clearly show that Congress fully considered the problems of restraints upon competition in the radio broadcasting industry, and that Congress fully considered the problems relating to chain broadcasting. Aware of these problems, it left the technical problems of chain broadcasting to be dealt with under Section 303, and it empowered the Commission to deal with transgressions of the principles and policies of the anti-trust laws only after a court had supplied the fact and conclusion. The statutory history is so clear as to preclude any argument that the Congress delegated to the Commission the power to promulgate the present regulations.

Much has been made by appellees of statements by Representative (now Senator) White and by Senator Dill upon the floors of the House and the Senate defending the above described distribution of power in the Radio Act of 1927. Reference has already been made to the very vocal Congressional minority which desired that the Commission be given the power to adjudicate questions of monopoly and

to the fact that the majority thought it wiser to leave anti-trust problems to the Department of Justice, the courts and the Federal Trade Commission.

When the minority charged that the bill did not sufficiently protect against monopoly, Representative White and Senator Dill rose to defend. They thought that the bill as passed properly took care of the problem of vested rights in the air; the problem that many broadcast stations broadcasting the same program on many different wave lengths might blanket out other stations; and that the bill disposed of problems under the anti-trust laws by specifically leaving them to the courts. Consequently their ready answer to the minority was that their bill had taken care of monopoly and it is wholly unjustifiable to cite their language as to the anti-monopoly characteristics of the bill as passed to support a wholly different concept of the method by which the bill might have achieved its objectives, such as the concept at present advanced by the Commission.

When H. R. 9971 was reported out of a committee of conference of the Senate and House in the 69th Congress, 2nd Session, Representative White summed up the distribution of power in the Bill on January 27, 1927, on the floor of the House:

> "Something has been said about monopoly; in fact, a great deal has been said about monopoly. I assert that whatever there may be of monopoly in connection with radio today is not in the field of transmission, but it is in the control of patents. Every Member here knows that the Merchant Marine and Fisheries Committee of the House has no jurisdiction over the question of patents.
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> . . . . . .

"But we have dealt with this question of monopoly in many ways. I have sketched off here as I sat at the table this afternoon the respects in which this bill deals with the question of monopoly. It starts out by asserting in the first place that the right to broadcast is to be based not upon the right of the individual, not upon the selfish desire of the individual, but upon a public interest to be served by the granting of these licenses. It places a limitation upon the right of the licensee to transfer his license at will; he may transfer that license only upon the express consent of the regulatory power of the United States. That is not all. We have provided that all laws of the United States relating to monopoly and agreements in restraint of trade shall be specifically applicable to the radio industry and to radio communication.

"*We have directed in this bill the licensing authority to refuse a license to any applicant found guilty of monopolizing or attempting to monopolize radio communication by any Federal court or by any other body vested with authority by law to make such a determination.* We have given jurisdiction in such cases to the licensing body, in truth we have *directed* the licensing power to revoke the license of a holder found guilty of such an offense. Then we have forbidden the merger in certain cases of radio and wire companies in order that we may preserve competitive conditions between these two means of communication.

"That is written expressly into this law. We have left intact and in force, supplementing this legislation, a great body of laws which now compose the interstate commerce acts of the United States. By those acts, in so far as they apply to radio companies, unjust charges are made unlawful. Discriminations are made unlawful; preferences, prejudices,

rebates, and all those things are made unlawful; and the Interstate Commerce Commission, under existing law, which, as I say, is left intact, supplementing this bill, is given wide authority and ample authority to make effective those principles of law laid down." (Cong. Rec., Vol. 68, Part 3, pp. 2579-2580.)

On February 3, 1927, Senator Dill, responding to a question concerning the blanketing of the air by chain broadcasting, gave his answer to various objections to the distribution of power:

"Mr. Broussard: I desire to ask the Senator from Washington a question which has been suggested to me by the remarks made by the Senator from Nevada [Mr. Pittman] and the questions asked by the Senator from Massachusetts [Mr. Walsh].

"I received this morning a telegram from Shreveport, La., signed by Mr. W. K. Henderson, who is a very wealthy man there, and who has a broadcasting station which he uses mostly to entertain his friends and to accommodate the public. I do not think he is making anything out of it. His telegram reads:

'Shreveport, La., January 31, 1927.

'Hon. Edwin S. Broussard,
United States Senate:

'Our Shreveport Times this morning carried headlines of 35 stations to be chained together. Just as I wired you the other day, chain stations will monopolize and independent stations, such as we have at Shreveport, are practically done for. Hope you will give bill considerable study and stand for interest of others beyond Radio Corporation of America who control chain stations. Between American Telephone & Telegraph Co. and Radio Corpora-

tion of America and other interests the independents are through.

W. K. HENDERSON,
Owner Radio Station KWKH.

"I should like to have the Senator from Washington cover the suggestion contained in telegram, and if the bill does actually make this impossible, to make that known to the Senate.

"Mr. Dill: I am very glad the Senator from Louisiana has asked the question. It gives me an opportunity to explain not only that but some things regarding what the Senator from Nevada said.

"In the first place, under this bill chain broadcasting today, concerning which the writer of the telegram is concerned, is absolutely without any regulation. We have no law today to handle the situation, and the various radio organizations, including the Radio Corporation of America and the American Telephone & Telegraph Co., are going ahead and building up the chain stations as they desire without let or hindrance and without any restrictions, because the Secretary of Commerce has no power to interfere with them. Unless this proposed legislation shall be enacted they will continue to do so, and they will be able by chain-broadcasting methods practically to obliterate the independent small stations, as the man who wrote the telegram suggests.

"While the commission would have the power under the general terms of the bill, the bill specifically sets out as one of the special powers of the commission the right to make specific regulations for governing chain broadcasting. As to creating a monopoly of radio in this country, let me say that this bill absolutely protects the public, so far as it can protect them, by giving the commission full power to refuse a license to anyone who it believes will not serve the public interest, convenience, or necessity. It specifically provides that any

corporation guilty of monopoly shall not only not receive a license but that its license may be revoked; and if after a corporation has received its license for a period of three years it is then discovered and found to be guilty of monopoly, its license will be revoked.

"In addition to that—

"Mr. Heflin: Mr. President—

"Mr. Dill: Just a moment. In addition to that, the bill contains a provision that no license may be transferred from one owner to another without the written consent of the commission, and the commission, of course, having the power to protect against a monopoly, must give such protection.

"I wish to state further that the only way by which monopolies in the radio business can secure control of radio here, even for a limited period of time, will be by the commission becoming servile to them. Power must be lodged somewhere, and I myself am unwilling to assume in advance that the commission proposed to be created will be servile to the desires and demands of great corporations of this country." (Cong. Rec., Vol. 68, Part 3, p. 2881.)

Thereafter the colloquy between Senator Dill and Senator Pittman referred to at pages 60-61 above took place on the floor of the Senate:

"Mr. Pitman: I understand; but *it is evident that the House did not intend that the commission to be appointed under this bill should have the determination of the question as to whether there was a monopoly existing* or whether there were overcharges or whether there were discriminations, and the reasons why they expressly left that out was because there were two bodies, each dealing with those subjects.

"Mr. Dill: *The Senator is correct in that.*" (Cong. Rec., Vol. 68, Part 3, p. 3034.)

That Representative White and Senator Dill interpreted the Act as analyzed above in this brief becomes apparent when it is recognized that the colloquy between Senator Dill and Senator Pittman took place after Senator Dill's speech defending the bill; and when the significance of his attempted amendment to the Radio Act in the 73rd Congress referred to on pages 61 to 62 above is appreciated.

In the court below the Government also relied upon certain legislative history including the history of Section 307(b) of the Communications Act of 1934 and the legislative history of the so-called Davis Amendment. The Government misconstrues this legislative history and it is set forth at pages 75 to 86 of Appendix D to this brief in case it is relied upon again. It is apparent that this legislative history refers only to the distribution of facilities geographically and among applicants, and has no relation whatever to restraints upon competition or the anti-trust laws.

POINT III.

The Commission Cannot Escape Its Duty to Evaluate and Decide Each License Application on Its Own Facts.

The licensing power delegated to the Commission by Sections 307(a) and 309(a) of the Act is the power and the duty to license individual applicants for radio stations if in each case the Commission finds upon all the facts of that case that the operation of the particular station by the particular licensee will serve the purposes of the Act. The latter section expressly provides that in the event the

Commission cannot decide favorably upon an application from an examination of the application itself, the applicant shall be granted a hearing.

The power and duty to decide particular cases does not include the power to foreclose the decision in each case by promulgating eight detailed substantive regulations determinative of all cases.

In *Waite* v. *Macy*, 246 U. S. 606 (1918), the Act of March 2, 1897, c. 358 (29 Stat. 604), provided for the establishment of standards "of purity, quality and fitness for consumption, of all kinds of tea imported," and made it unlawful "to import any merchandise as tea which is inferior in purity, quality and fitness for consumption to the standards" referred to. Tea when entered at the Customs House was first checked by an examiner to see if it met the prescribed standards, and upon protest was re-examined by a board of general appraisers, known as the Tea Board. The Act provided:

> "Sec. 10. That the Secretary of the Treasury shall have the power to enforce the provisions of this Act by appropriate regulations."

The Secretary promulgated a regulation for the guidance of the Tea Board which prescribed a test for the discovery of artificial coloring matter in tea and made the presence of any coloring matter an absolute ground for exclusion. Plaintiffs, tea importers, sued to enjoin the Tea Board from applying the test to plaintiff's tea, which was of superior quality but would be excluded under the regulation because it contained a minute quantity of innocuous coloring matter. The Court granted the injunction, saying through Justice Holmes:

"The regulation makes the presence of any coloring matter an absolute ground for exclusion. But the only grounds recognized by the statute are inferiority to the standard in purity, quality and fitness for consumption, words repeated over and over again in the act. It cannot be made a rule of law that any tea that has an infinitesimal amount of innocuous coloring matter is inferior in those respects to a standard that has a much greater amount of other impurities and is worth only a quarter as much. All extraneous substances are impurities, and the presence of any may be detected in any way found efficient. But one such substance cannot be picked out and accorded supremacy in evil by an absolute rule irrespective of any harm that it may do." (pp. 609-10)

In the present case, the only ground recognized by the statute for denial of an application for a license is that the proposed operation will not be "in the public interest, convenience or necessity" as determined by the Commission in each individual case upon its own facts. In each case this depends upon a multitude of factors to be analyzed and weighed by the Commission in the exercise of administrative discretion.

The point is further illustrated by *Work* v. *Mosier*, 261 U. S. 352 (1923), which arose under an Act of Congress authorizing distribution of certain lands among the Osage Indians, reserving, however, the mineral rights for the use of the tribe as a whole. These rights were to be leased by the Tribal Council, under rules prescribed by the Secretary of the Interior, and the royalties distributed quarterly to members of the tribe. In the case of minors, however, the Act provided that a minor's share should be paid quar-

terly to his parents "*Provided*, That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest."

The income from the properties became so large that the Secretary of the Interior grew concerned over possible misuse and sacrifice of the minors' income if turned over to the unrestricted use of parents. Accordingly, the Secretary issued a general order declaring that thereafter all such income must be devoted solely to the care and use of the minor, that any other use would be deemed misuse, and that no more than $50 a month would be paid to parents on account of a minor's share unless a specific showing was made that the funds were being used for his specific benefit.

Plaintiffs sought to compel the Secretary to pay to them moneys due their minor children, alleging that the limitations imposed by the regulation were invalid. The court acknowledged that Congress had vested in the Commissioner of Indian Affairs, subject to the supervision of the Secretary of the Interior, discretion to look after the minor's interest and authority to withhold payment whenever he found misuse or squandering of the income by the parents. The Court then said:

> "The record shows that the Secretary enlarged this discretion vested in him and his subordinate into a power to lay down regulations, limiting in advance the amount to be paid to the parents to a certain monthly rate, and declaring that no use of the funds would be permitted which did not inure to the separate benefit of the minor. He was led to take this action, which was a departure from the

previous practice of the Department during the decade immediately following the passage of the act, because of the sudden increase in the income of the minors resulting from the bonuses given for mineral leases. However desirable such regulations were, in view of the changed circumstances, we think they were in the nature of legislation beyond the power of the Secretary. Congress has since met the need by an amendment to the Act of 1906 by the Act of March 3, 1921, 41 Stat. 1249.

"The direction to the Secretary to pay to the parents the income due to the minors is clear and positive. It is that the income 'shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years.' The proviso 'That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment' did not confer on him a power to determine in advance by general limitation a monthly rate in excess of which what was due minors should not be paid to parents, nor did it enable him to require before payment a showing that the income beyond such limited monthly rate was being used for the specific benefit of each child. Congress evidently intended that the Commissioner should through his agents keep track of the conduct of parents in the use of the income of their children and necessarily vested him and the Secretary with power to require an account of how the income was being used; but this was not a regulatory function to be exercised in advance of payment which is positively enjoined. The proviso imposes on the Commissioner the duty of supervising each case and determining from the circumstances whether there has been, in cases of payments made, misuse or squandering, and if so, of withholding further payment on account of it." (pp. 359-360)

In *Steinmetz* v. *Allen*, 192 U. S. 543 (1904), plaintiff had applied for a patent and had joined in the same application both process and apparatus claims. The examiner ordered a division, pursuant to Rule 41 of Practice in the Patent Office which required process and apparatus claims to be presented in separate applications. Plaintiff challenged the validity of this rule, and the Commissioner sought to justify it on the ground that the statute gave to the Patent Office a discretion to permit or deny a joinder of inventions.

The Court held that although the statute might permit the Patent Office to compel a division of applications in particular cases if the process and apparatus were found to be separate and distinct, it did not authorize compulsory division of inventions which were closely related. Whether inventions were so independent as to justify division called for the exercise of discretion and could only be decided by examination of each application on its facts. The Court said:

> "Some discretion is not an unlimited discretion, and if the discretion be not unlimited it is reviewable. In other words, the statute gives the right to join inventions in one application in cases where the inventions are related, and it cannot be denied by a hard and fixed rule which prevents such joinder in all cases. *Such a rule is not the exercise of discretion; it is a determination not to hear.* No inventor can reach the point of invoking the discretion of the Patent Office. *He is notified in advance that he will not be heard, no matter what he might be able to show. His right is denied, therefore, not regulated.* Such is the necessary effect of rule 41, as amended.
>
> "Without that rule the action of the Patent Office can be accommodated to the character of inven-

tions, and discretion can be exercised, and when exercised, we may say in passing, except in cases of clear abuse, the courts will not review it. But the rule as amended, as we have said, precludes the exercise of any judgment and compels the separation of claims for a process and claims for its apparatus, however related or connected they may be." (pp. 560-561)

In *Miller* v. *United States*, 294 U. S. 435 (1935), plaintiff had been issued a war risk insurance policy granting benefits for injuries causing total and permanent disability. Plaintiff, twelve years after discharge, having presented a claim to the Administrator of Veterans' Affairs which was disallowed, brought suit on the policy alleging loss of an arm and an eye. The War Risk Insurance Act, c. 77, 40 Stat. 555, provided separately for compensation allowances and war risk insurance in case of "total permanent disability." The provision with respect to compensation was amended in 1919 so as to bring conclusively within the term "total permanent disability" the loss of one hand and one eye, but no such amendment was carried into the insurance article of the Act. In 1930, however; the Administrator issued Regulation 3140 which declared that the loss of one hand and one eye "shall be deemed to be total permanent disability under yearly renewable term insurance." The Act conferred upon the Director of the Bureau authority "to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes * * *."

The plaintiff contended that his injuries constituted total and permanent disability as a matter of law by virtue of the regulation. The Court held the regulation was both inapplicable and invalid. It was inapplicable because it was

promulgated long after plaintiff's cause of action matured, and would not be construed to operate retroactively. It was invalid because it attempted to convert the issue of disability, a question of fact requiring proof, into a conclusive presumption. With respect to the latter the Court said:

> "It is invalid because not within the authority conferred by the statute upon the Director (or his successor, the Administrator) to make regulations to carry out the purposes of the act. It is not, in the sense of the statute, a regulation at all, but legislation. The effect of the statute in force at the time of the adoption of the so-called regulation is that *in respect of compensation allowances,* loss of a hand and an eye shall be deemed total permanent disability as a matter of law. There being no such provision with respect to cases of insurance, the question whether a loss of that character or any other specific disability constitutes total permanent disability is left to be determined as matter of fact. *The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is beyond administrative power.* The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it." (p. 439)

See also:

Doran, et al. v. *Eisenberg,* 30 F. (2d) 503 (C. C. A. 3rd, 1929).

The direct application of the foregoing decisions to the case at bar is apparent. In both the *Waite* case and the

Miller case, the statute expressly empowered the administrative agency to make regulations to enforce or to carry out the purposes of the Act. The Federal Communications Commission's power to make regulations is no more broad.

Both the Commission and the District Court urge that the application of the doctrines of the foregoing authorities to the present case would go far to destroy the power to make any regulations at all. In support of this argument and in default of other authority, the Commission has cited regulations made under its authority to assign bands of frequencies and its authority to make regulations necessary to prevent interference between stations, the validity of which appellants concede.

The fact that the Commission can perform some of its functions by way of regulations does not mean that the Commission may perform all of its functions by way of regulations and never exercise its primary licensing function. There are certain situations where it is necessary that the Commission exercise its discretion on the facts of individual cases and certain situations where the Commission must make *a priori* determinations. Appellants do not dispute the Commission's power to make regulations assigning bands of frequencies or otherwise classifying the radio spectrum. These matters must be done by general regulations if they are to be done at all, and cannot be made discretionary from case to case. Indeed, the Commission's power to make regulations classifying the radio spectrum have been held to be so peculiarly within the jurisdiction of the Commission as to be immune from any judicial review at all. *Pittsburgh Radio Supply House* v. *Federal Communications Commission*, 98 F. (2d) 303 (App. D. C. 1938).

Appellants do, however, dispute the validity of the Commission's attempt to abdicate its discretion by the promulgation of iron-bound rules in situations where the statute compels it to exercise that discretion on a case to case basis.

The point can be made more clear by comparing regulation 3.106 with the other regulations promulgated by the Order. Regulation 3.106 provides, in part:

> "No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization * * * for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

Here the Commission has at least retained a modicum of discretion with respect to the disposition of a particular license application to which the regulation might be applied. Here also the applicant would be enabled to test the validity of the Commission's judgment as to a substantial restraint upon competition on appeal from the licensing proceeding.

The other regulations are quite different. They leave no room whatever for the exercise of the Commission's discretion from case to case. Further, if the validity of the Order is upheld in this suit no applicant for a license will be able to test the Commission's conclusions as to whether the proscribed contractual provisions in his particular situation constitute a substantial restraint on competition or are contrary to the public interest, convenience or necessity.

This Court stated in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940), that comparative considerations have governed the Commission's licensing function since the beginning of regulation under the Act of 1927. Now the Commission would substitute absolutism. As stated by this Court in *Columbia Broadcasting System, Inc.* v. *United States, et al.*, the companion case on these regulations:

> "The regulations are rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the grounds specified in the regulations without more. (R. 486)
>
> • • • •
>
> "Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations." (R. 488)

POINT IV.

The Order is Arbitrary and Capricious and This Contention Cannot Be Disposed of Upon the Hearings Held Before the Commission.

Appellants maintain that the Order of the Commission was entered in utter disregard of the Commission's stated functions under the Communications Act of 1934. The Commission has gone far beyond the intention of Congress in enacting Title III of the Act, has construed the statute so as to overstep the bounds of Article I, Section 1, of the Constitution, and has asserted powers wholly incompatible

with the First Amendment. Appellants believe that this Court can determine from the face of the Report on Chain Broadcasting, the Supplemental Report and the Order that the Commission has exceeded its jurisdiction and that the Order is invalid. It is submitted that the decision of the District Court dismissing appellants' complaint on the merits should be reversed and the cause remanded to that court for the issuance of a permanent injunction against the enforcement of the Order.

The remainder of this Point is based upon the hypothesis that the construction placed upon Title III of the Communications Act of 1934 by the Commission and the District Court is supportable.

Even assuming that the Act may validly be construed to enable the Commission to deal with the matters with which the Order is concerned, the question still remains whether the Order is not arbitrary and capricious. Appellants maintain that the Order was entered in utter disregard of the practical exigencies of network broadcasting.

The sum and substance of appellants' position as to the effect of forbidding the networks to obtain firm options on station time is succinctly expressed in the words of the Commission majority at page 64 of its Report:

> "Few sponsors are willing to spend large sums in building up a program series to be broadcast over a definite number of stations at a certain hour if some of the important stations are subject to withdrawal upon order of a dominant network." (R. 100)

Whether there be withdrawal or refusal, upon order of a "dominant" network, upon order of any network or upon order of anyone else makes no difference. The vital issue

is that time must be cleared if network broadcasting is to continue.

Whatever restraint upon competition may result from option time is such a restraint as is known to the law as reasonable because it is a necessary effect of network broadcasting over the facilities of independent station licensees. It is, in the words of Mr. Justice Brandeis in *Chicago Board of Trade* v. *U. S.*, 246 U. S. 231, 238 (1918), a restraint "such as merely regulates and perhaps thereby promotes competition," for without option time there could be no competitive nation-wide network broadcasting. Cohesive network organizations able to compete with other advertising media or with one another could not exist.

Appellants have shown that the Commission has not felt satisfied to deal with competition in the business of network broadcasting under the anti-trust laws with due regard to the limitations of those laws, including the rule of reason. The Order represents a pursuit on the part of the Commission of its own concepts as to restraints of trade to the point where the continuance of adequate network broadcasting services is rendered impossible.

The Commission has disclaimed the duty to find a violation of the anti-trust laws and has assumed a power to deal with network broadcasting utterly without limitation. Appellants have also shown in Point III that the Commission has likewise disclaimed any duty to evaluate its policy of unlimited competition upon the facts of individual license cases. Appellants maintain that this utter disregard of any defined responsibility under the Communications Act of 1934, together with the disastrous effect of the Order upon network broadcasting, clearly demonstrates that the Order is arbitrary and capricious.

Even if it be conceded that the Commission has the comprehensive power over business practices claimed by it, that power must still be exercised in a reasonable manner. To attribute an over-riding importance to concepts of unlimited competition to the exclusion of all the other considerations which must enter into any such comprehensive power is just as arbitrary and invalid (*Waite* v. *Macy*, 246 U. S. 606, *supra*) as a complete departure from a more narrowly defined jurisdiction. *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55 (1937); *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433 (1911); *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658 (1930); *International Ry. Co.* v. *Davidson*, 257 U. S. 506 (1922); *Morgan* v. *Nolan*, 3 F. Supp. 143 (S. D. Ind. 1933), affd. 69 F. (2d) 471 (C. C. A. 7th, 1934).

The District Court disposed of this contention by applying the substantial evidence rule to the record of the hearings held by the Commission prior to the promulgation of the Order and refusing to hold a trial itself. Appellants maintain that the record of the hearings held by the Commission prior to the promulgation of the Order is not sufficient to preclude the introduction of evidence before the District Court with respect to the validity of the Order.

The Communications Act of 1934 contains no requirement for a quasi-judicial hearing prior to the issuance of the type of order here in dispute and the Commission held no such hearing. Commission Order No. 37 entitled "Order Instituting Chain Broadcasting Investigation" (R. 27, 131) authorized the Commission to undertake an investigation to determine what special regulations applicable to radio stations engaged in chain or *other* broadcasting were re-

quired in the public interest; such investigation to include an inquiry into thirteen specified matters which are industry-wide in scope as well as all other pertinent and related matters. The scope of the thirteen specified matters in Order No. 37 can only be appreciated by reading them in detail. It is sufficient here to note that they range from the program policies of the various networks to technical problems of duplication of network programs.

The Order also covered all other pertinent and related matters including those covered in the so-called "report on social and economic data" of January 20, 1938. That report covered service to the people of the United States; the extent to which broadcasting assists in the development of national, community and individual well-being; the extending of good broadcast reception into American homes to the widest possible extent; program service; the character of licensees; the American system of radio; susceptibility of improvement; super-power on clear channels; 500 kilowatt stations; newspaper ownership of radio stations; criticism of the American system of broadcasting by education and labor; and profits made by broadcasting stations and business affiliations of licensees.

The investigation was just as broad as Order No. 37. It was obvious to everyone the Commission asked to attend the hearings that the Commission was conducting a general investigation for its general information. NBC treated the proceeding as such, and introduced evidence as to the general character of its operations. Only the technical problems of duplication were developed in detail.

Appendix E to this brief is a partial history of the procedure followed by the Commission in conducting its in-

vestigation into chain broadcasting pursuant to Order No. 37. That history clearly shows that the hearings held before the Commission pursuant to the chain broadcasting investigation do not constitute a sufficient record to preclude the introduction of evidence before the District Court. Counsel for the Commission stated that there were "no parties to this proceeding at all."* Commissioner Brown stated that it was "not an adversary proceeding."* Commissioner Walker stated that the investigation was not "a case that will be appealed anywhere."* Furthermore, in formulating its Order, the Commission by no means confined itself to the record made before it but considered also answers to questionnaires, its files, informal consultations and matters submitted to the Congress.†

Not only will a brief perusal of the cases dealing with the requisites of a hearing sufficient to preclude the parties thereto from introducing evidence before a court upon review readily satisfy the mind that such hearings must be conducted in a completely different manner‡, but it is obvious that issues as important as those here involved cannot be disposed of upon the basis of such a formless proceeding.

Indeed, the evidence was not sufficient to enable the majority of the Commission itself either to find that appellants' contracts violated the anti-trust laws or to evaluate

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* Appendix E, p. 92.

† Appendix E, pp. 93, 95-97.

‡ *Morgan* v. *U. S.*, 304 U. S. 1 (1938); *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 302 (1937).

the effect of the Order upon network broadcasting. Although the Commission has urged in the Court below that "in this instance the care and patience with which the Commission fulfilled its appointed task are plain, even to the occasional reader, upon the face of its report," appellants submit that the following statement of minority Commissioner Craven in the hearings before the Committee on Interstate Commerce of the United States Senate on S. Res. 113, 77th Congress, 1st Sess. (1941), is relevant to that claim:

> "We are convinced that the majority itself does not realize the effect of their proposals upon broadcasting service to the public. For example, the original draft of what is now the majority report contained the following statement:
>
> "'* * * *We cannot now determine the competitive effect of such contractual provisions; or how they will work out in actual practice. They will have to be examined later in the light of all developments in the field of network broadcasting.*'
>
> "The foregoing statement was eliminated in the final draft of the report. However, in my opinion, there has never been a satisfactory explanation by any of the majority as to how their proposals will work out in practice" (pp. 261-262).

Commissioner Craven went on to testify:

> "The rules were received by the various Commissioners—the rules themselves, not the report—about 18 hours before the meeting in which the final votes were taken. Most of those hours were the night hours. * * *
>
> "* * * I will wager that the majority itself does not know what the rules mean. *Furthermore, I*

know that one member of the majority believes one of the rules to be so impractical that it makes almost impossible the operation of chain broadcasting on a stable basis.

"Senator Clark of Idaho: Which rule was that, if I may ask?

"Mr. Craven: On time option • • •" (pp. 268-269).

The importance of the issues in this case cannot be overestimated. The whole future of network broadcasting is at stake. Upon the present affiliation contracts has been built the finest national radio service in the entire world. Moreover, the availability of this instantaneous means of simultaneous national communication makes radio an incalculable national asset in peace and a vital necessity in time of war. Speeches explaining the progress of the war and informing the American people as to what is expected of them are heard over the facilities of national networks. Before the present network organizations are broken down through the abolition of option time, appellants are entitled to a full and fair trial as to the validity of their contracts, a trial which the chain broadcasting investigation did not accord them.

Of the 3,225 pages of testimony submitted by NBC in the hearings conducted pursuant to that investigation, only a small part dealt with affiliation contracts and only a fraction of that part was addressed to option time; even that was addressed to exposition rather than to defense.

The Commission, in its investigation, did not request the presence of the national advertisers who alone support network broadcasting. NBC and the other network organizations did not come forward with detailed evidence as to the reasonableness of their contracts nor call in the national

advertisers because they did not conceive such to be their duty. The proceeding was simply not one by which anyone expected to be bound.

The affidavit of Niles Trammell (R. 225, 248-250) submitted in support of appellants' motion for preliminary injunction specifies some of the results which will follow if the Order is permitted to become effective. Each of the present nation-wide networks is made up of a few large stations and many smaller stations, all of which are enabled to function as an integrated unit for the purposes of attaining simultaneous nation-wide circulation through their affiliation contracts with one of the four network organizations. If option time is outlawed the present network organizations will be unable to meet the requirements of national advertisers for simultaneous nation-wide circulation and national advertisers will be remitted to their own devices.

Remitted to his own devices it is inevitable that the national advertiser will seek to broadcast his program over the largest and most powerful stations in each area without regard to their network affiliations. These stations will give the most economical circulation and the national advertisers will compete for these stations to the exclusion of the others in each area.*

The resulting diversion of national advertising revenues to the best stations in each area will be disastrous. The national advertiser will not assume the burden of producing a continuous schedule of sustaining programs. The existing network organizations will no longer have either

* It must also be pointed out that the Order does not prevent stations from granting an option to advertising agencies. Advertising agencies would thus be enabled to obtain all the commercial benefits of option time without the obligation of assuming the duties of producing sustaining programs or making time available for matters of national significance.

the incentive or the funds to produce their existing schedules of sustaining programs. Moreover, the revenues which the smaller stations will be able to attract will be so reduced that they will be unable to afford even the cost of wire-lines, let alone the production of sustaining programs. The complete atrophy of the facilities over which public service programs are currently conveyed to the nation will follow. Instead of four vigorously competing nation-wide network organizations assuming the job of producing sustaining and news programs of national significance and expanding their service to parts of the country that could not otherwise have network programs, the best stations in each area will absorb a disproportionate share of available advertising revenues, to the irreparable injury of the present radio service.

These results of the Order are well-known in broadcasting and advertising businesses. They can be substantiated by testimony upon trial and they cannot be disproved by mere argument on the part of the Commission. The Commission purported to protect against the diversion of advertising revenues to the best station in each area by permitting network organizations to give the stations "first call" on their programs. This is no protection at all, for stations will give "first call" only to those who have the best commercial programs to offer, and under the Order the advertisers and the advertising agencies will schedule their programs directly.

The Commission's failure throughout this proceeding to give heed to or seek information with respect to the effect of the Order amply demonstrates the need for a full and fair exploration of the issues involved, an exploration such as can only be had at a trial where the parties can submit evidence bearing directly upon the question.

As has been pointed out above, appellants believe that the proper forum for the trial upon the validity of their contracts is the District Court in Chicago. If this contention be denied, appellants are nonetheless entitled to a full and fair trial in the District Court for the Southern District of New York.

Conclusion.

For these reasons, it is submitted that the decision of the District Court dismissing appellants' complaint on the merits should be reversed and the cause remanded to that Court for the issuance of a permanent injunction against the enforcement of the Order or, in the alternative, for the issuance of a temporary injunction and the holding of a trial before that Court on the issues raised by the complaint and the answer to be filed by appellees.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 554.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDICES TO BRIEF FOR APPELLANT NATIONAL BROADCASTING COMPANY, INC.

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APPENDIX A.

Provisions of the Communications Act of 1934, as Amended, Pertinent to This Appeal.

Title I—General Provisions.

Section 3. For the purposes of this Act unless the context otherwise requires——

* * * * * *

(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

* * * * * *

(p) 'Chain broadcasting' means simultaneous broadcasting of an identical program by two or more connected stations.

Section 4.

* * * * * *

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attor-

ney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

Title III—Provisions Relating to Radio.

Part I—General Provisions.

Section 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United

States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * * *

Section 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall——

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the

larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified;

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee——

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interferred with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

(n) Have authority to inspect all radio installations associated with stations required to be licensed

by any Act or which are subject to the provisions of any Act, treaty or convention binding on the United States, to ascertain whether in construction, installation, and operation they conforms [*sic*] to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act.

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * * * * *

Section 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(c) The Commission shall study the proposal that Congress by statute allocate fixed percentages of radio broadcasting facilities to particular types or kinds of non-profit radio programs or to persons identified with particular types or kinds of non-profit activities, and shall report to Congress, not later than February 1, 1935, its recommendations together with the reasons for the same.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

(e) No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license.

Section 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: *Provided, however*, That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications

of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided further*, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and operation of submarine cables in the United States", approved May 24, 1921.

Section 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

Section 310. (a) The station license required hereby shall not be granted to or held by—

(1) Any alien or the representative of any alien;

(2) Any foreign government or the representative thereof;

(3) Any corporation organized under the laws of any foreign government;

(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country; if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

Nothing in this subsection shall prevent the licensing of radio apparatus on board any vessel, aircraft, or other mobile station of the United States when the installation and use of such apparatus is required by Act of Congress or any treaty to which the United States is a party.

(b) The station license required hereby the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.

Section 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license and/or permit to any other person

(or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation.

Section 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however*, That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided, however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

Section 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided however,* That such licensee shall have the

same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

Section 314. After the effective date of this Act no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this Act, shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease,

construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.

* * * * * *

Section 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information

as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

* * * * * *

Section 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. No person within the jurisdiction of the United States shall utter any obscene,

indecent, or profane language by means of radio communication.

Title VI—Miscellaneous Provisions.

Section 602—

* * * * * *

(d) The first paragraph of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, is amended to read as follows:

"Sec. 11. That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:"

APPENDIX B.

Chronological History of the Order in Docket No. 5060

The Original Order

The Order was entered on May 2, 1941, and read as follows:

"BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

Commission Order In Docket No. 5060

IN THE MATTER OF THE INVESTIGATION OF CHAIN BROADCASTING

May 2, 1941

WHEREAS, the Commission on March 18, 1938, by Order No. 37, authorized an investigation 'to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity;'

WHEREAS, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and 'to make reports to the Commission with recommendations for action by the Commission;'

WHEREAS, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

WHEREAS, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

WHEREAS, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached;

NOW, THEREFORE, IT IS HEREBY ORDERED, That the following regulations be and they are hereby adopted:

3.101. No license shall be granted to a standard broadcast station having any contract, arrangement or understanding, express or implied, with a network organization[1] under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization. See Chapter VII, A, 1.

3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. See Chapter VII, A, 2; and J.

3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: *Provided*, That a contract, arrangement, or understanding for a one-year period, may be entered into within sixty days prior to the commencement of such one-year period. See Chapter VII, B.

3.104. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally

[1] The term "network organization," as used herein, includes national and regional network organizations. See Chapter VII, J.

agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time. See Chapter VII, C.

3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. See Chapter VII, D.

3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control[2] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. See Chapter VII, E.

3.107. No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is

[2] The word "control" as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

no sustantial overlap in the territory served by the group of stations comprising each such network. See Chapter VII, F.

3.108. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. See Chapter VII, G.

IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided,* That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further,* That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.

FEDERAL COMMUNICATIONS COMMISSION,

T. J. SLOWIE, *Secretary.*"

Postponement of ¶3.107

On June 13, 1941 the effective date of Regulation 3.107 was postponed by an order of the Commission reading as follows:

"FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

June 13, 1941.

ORDER

At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 13th day of June, 1941, the Commission having under consideration its order adopted May 2, 1941 in Docket

No. 5060 promulgating regulations applicable to radio stations engaged in chain broadcasting;

IT IS ORDERED, That the last paragraph of the said order of May 2, 1941, entered in Docket No. 5060, be and the same is hereby amended to read as follows:

'IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided,* That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, or the maintenance of more than one network by a single network organization, the effective date shall be deferred for 90 days from the date of this Order (May 2, 1941): *Provided further,* That the effective date of Regulation 3.106 with respect to any station and of Regulation 3.107 may be extended from time to time in order to permit the orderly disposition of properties.'

FEDERAL COMMUNICATIONS COMMISSION,

T. J. SLOWIE,

T. J. Slowie, Secretary."

Postponement to September 16, 1941

On July 22, 1941, the effective date for that part of the Order which was to have become effective on July 31, 1941 (i.e., 90 days after the date of the original Order) was changed to September 16, 1941 by another order of the Commission reading as follows:

"FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

July 22, 1941

ORDER

At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the

22nd day of July, 1941, the Commission having under consideration the petitions of the National Broadcasting Company and of the Columbia Broadcasting System requesting that the Commission postpone the effective date of its order entered in Docket No. 5060 promulgating regulations applicable to radio stations engaged in chain broadcasting:

IT IS ORDERED, That the last paragraph of the said order of May 2, 1941, entered in Docket No. 5060, BE, AND THE SAME IS HEREBY, AMENDED to read as follows:

'IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses or the maintenance of more than one network by a single network organization, the effective date shall be deferred until September 16, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station and of Regulation 3.107 may be extended from time to time in order to permit the orderly disposition of properties.'

FEDERAL COMMUNICATIONS COMMISSION

WM. P. MASSING

Wm. P. Massing
Acting Secretary"

Postponement to Indeterminate Time After September 12, 1941

On August 28, 1941, the effective date for that part of the Order which was to have become effective on September 16, 1941 was changed by the following public notice to an indeterminate time to be fixed by the Commission on or after September 12, 1941:

"FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

PUBLIC NOTICE
August 28, 1941.

MODIFICATION OF CHAIN BROADCASTING RULES SET FOR ARGUMENT

On August 14, 1941, Mutual Broadcasting System, Inc. filed with the Commission a petition requesting it to amend its regulations dealing with network option time and the term of affiliation contracts. This petition has been set for oral argument before the Commission en banc on Friday, September 12, 1941 at 10 A. M. at a place hereafter to be announced. At that time the Commission will hear oral argument by Mutual Broadcasting System, Inc., and by any other licensees and network organizations who desire to be heard with respect to the chain broadcasting regulations as promulgated, the Mutual petition or any other modification of any of the chain broadcasting regulations which those appearing desire to propose. All persons wishing to be heard are requested to file appearances with the Secretary of the Commission on or before September 10th. Written briefs may be filed on or before September 12th.

The Chain broadcasting regulations will not be placed in effect with respect to existing affiliation contracts, or network organization station licenses, or the maintenance of more than one network by a single network organization, until after the disposition of the Mutual petition and of any other which may be filed."

Amendment of Order; Postponement to November 15, 1941

On October 11, 1941 (after a rehearing on September 12, 1941), the Order was amended as follows:

"FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

October 11, 1941

ORDER

At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 11th day of October, 1941,

The Commission having under consideration the petition of the Mutual Broadcasting System, filed August 14, 1941, requesting that the Commission amend its order entered in Docket No. 5060 promulgating regulations applicable to radio stations engaged in chain broadcasting by modifying the regulations dealing with option time and the duration of affiliation contracts, having heard oral argument on said petition and having reconsidered its report and order in Docket No. 5060,

IT IS ORDERED, That the Commission's order of May 2, 1941, entered in Docket No. 5060, BE, AND THE SAME IS HEREBY, AMENDED in the following particulars:

Sections 3.102, 3.103 and 3.104 of the Regulations set forth in said order are hereby amended to read as follows:

Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organiza-

tion. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

Section 3.104. No license shall be granted to a standard broadcast station which options[1] for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours[2] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a.m. to 1 p.m.; 1 p.m. to 6 p.m.; 6 p.m. to 11 p.m.; 11 p.m. to 8 a.m.[3] Such options may

[1] As used in this section, an option is any contract, agreement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

[2] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

[3] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

The last paragraph of said order is hereby amended to read as follows:

"IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.

T. J. SLOWIE,
Secretary."

The "Minute" of October 31, 1941

On October 31, 1941, after the present action had been instituted, the Commission entered the following minute which operated further to suspend Regulation 3.106:

"Procedure in Docket No. 5060.

The Commission today adopted the following minute setting forth the procedure that it will follow in applying the policies announced in the Chain Broadcasting Regulations:

If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060,

or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106, relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations."

Stipulation of November 12, 1941

On November 12, 1941, the parties to the present action entered into the following stipulation:

"Stipulation

It is hereby stipulated by and between all the parties by their respective counsel:

1. That counsel for all parties will cooperate to bring on for hearing on or before December 15, 1941, the Motion for Preliminary Injunction heretofore filed by plaintiffs and the defendants' Motion to Dismiss the Complaint or, in the alternative, for Summary Judgment.

2. Pending such hearing by this Court and the determination by it of plaintiffs' said Motion for Preliminary Injunction, the defendant Federal Communications Commission is suspending, and will take no steps for enforcement or applications of, the Commission's Order of May 2, 1941, in Docket No. 5060, as last amended October 11, 1941, with respect to any failure by any radio station to comply with such Order.

3. Any party hereto may move before the Court to modify the terms of this stipulation to the same extent which such party would be entitled to had this stipulation been in the form of a temporary restraining order issued after hearing.

UNITED STATES OF AMERICA
By Samuel Brodsky,
Special Assistant to the Attorney General.

FEDERAL COMMUNICATIONS COMMISSION
By Telford Taylor
Telford Taylor,
General Counsel.

Thomas E. Harris
Thomas E. Harris,
Assistant General Counsel.

NATIONAL BROADCASTING COMPANY, INC.
By Wright, Gordon, Zachry,
Parlin & Cahill,
by John T. Cahill.

WOODMEN OF THE WORLD LIFE
INSURANCE SOCIETY
By Thomson, Wood & Hoffman, Attys.
John B. Dawson.

STROMBERG CARLSON TELEPHONE
MANUFACTURING COMPANY

By Hill, Rivkins & Middleton
By Thomas H. Middleton

SO ORDERED: 11/12/41

Learned Hand
U. S. C. J.

John Bright
U. S. D. J.

Henry W. Goddard
U. S. D. J."

Restraining Order of March 2, 1942

On March 2, 1942, the District Court entered the following decree:

"DECREE GRANTING TEMPORARY RESTRAINING ORDER

This cause came on to be further heard at the February, 1942, term of this Court and was argued by counsel and thereupon, upon consideration thereof, it appearing that the relief herein granted is necessary to preserve the status quo pending an appeal by the plaintiffs to the Supreme Court, for the reasons appearing in the Opinion, and Findings of Fact and Conclusion of Law, filed herewith, it is

Ordered, Adjudged and Decreed that until May first, 1942 or the argument of the appeal herein to the Supreme Court of the United States, whichever is earlier, the Federal Communications Commission be and the same hereby is restrained from enforcing those regulations which were issued in their amended form on October 11, 1942, and which are known as 'Order in Docket No. 5060.'

Learned Hand, U. S. C. J.; Henry W. Goddard, U. S. D. J.; John Bright, U. S. D. J."

Stipulation of April 24, 1942

On April 24, 1942, the parties to this action entered into the following stipulation:

"IT IS HEREBY STIPULATED by and between all the parties by their respective counsel that:

Until the last decision day of the October, 1941, term of the Supreme Court of the United States or until the determination of the pending appeal in the above entitled case by said Court, whichever is earlier, the defendant-appellee Federal Communications Commission is suspending, and will take no steps for enforcement or application of, the Commission's Order of May 2, 1941, in Docket No. 5060, as last amended October 11, 1941, with respect to any failure by any radio station to comply with such order.

Dated, April 24, 1942.

CHARLES FAHY
Solicitor General of the United States of America.

TELFORD TAYLOR
General Counsel for Federal Communications Commission.

JOHN T. CAHILL
Solicitor for National Broadcasting Company, Inc.

DAVID M. WOOD
Solicitor for Woodmen of the World Life Insurance Society.

THOMAS H. MIDDLETON
Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

LOUIS G. CALDWELL
Solicitor for Mutual Broadcasting System, Inc."

Opinion of this Court on Stay

On June 1, 1942, this Court handed down its opinion reversing the dismissal of the complaint by the District Court. The opinion in the Columbia Broadcasting System case contained the following statement:

"The stay now in effect will be continued, on terms to be settled by the court below."

And the opinion in the National Broadcasting Company case contained the following sentence:

"As in the *Columbia* case the stay now in effect will be continued on terms to be settled by the court below."

Restraining Order of November 16, 1942.

On November 16, 1942, the District Court entered the following decree:

"DECREE GRANTING TEMPORARY RESTRAINING ORDER.

This cause came on to be further heard at the October, 1942, term of this court and was argued by counsel and thereupon, upon consideration thereof, it appearing that the relief herein granted is necessary to preserve the *status quo* pending an appeal by the plaintiffs to the Supreme Court, for the reasons appearing in the Findings of Fact filed herewith, it is

ORDERED, ADJUDGED AND DECREED that until February 1, 1943, or the argument of the appeal herein in the Supreme Court of the United States, whichever is earlier, the Federal Communications Commission be and the same hereby is restrained from enforcing those regulations which were issued in their amended form on October 11, 1941, and which are known as 'Order in Docket No. 5060.'

LEARNED HAND,
U. S. C. J.

HENRY W. GODDARD,
U. S. D. J.

JOHN BRIGHT,
U. S. D. J."

APPENDIX C.

Complaint in Pending Anti-Trust Suit in Chicago Against NBC.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

UNITED STATES OF AMERICA,

v.

RADIO CORPORATION OF AMERICA, NATIONAL BROADCASTING COMPANY, DAVID SARNOFF, NILES TRAMMELL, WILLIAM S. HEDGES, MARK G. WOODS, and GEORGE ENGLES.

COMPLAINT.

The United States of America, by J. Albert Woll, its attorney for the Northern District of Illinois, Thurman Arnold, Assistant Attorney General, and Daniel B. Britt and Victor O. Waters, Special Assistants to the Attorney General, acting under the direction of the Attorney General, files this complaint against the following named defendants and complains and alleges upon information and belief as follows:

I.

Defendants.

1. That the Radio Corporation of America, hereinafter referred to as RCA, a corporation organized and duly authorized to do business under the laws of the State of

Delaware, is made a defendant herein; that RCA is engaged directly and through its subsidiary companies in virtually all phases of the radio industry and many allied businesses, including the manufacture of radios and radio apparatus, electrical transcriptions, the management of talent, the granting of licenses under numerous patents owned and controlled by it, the operation of point to point radio communications, and the operation of two national radio network systems;

2. That the National Broadcasting Company, hereinafter referred to as NBC, a corporation organized and duly authorized to do business under the laws of the State of Delaware, is made a defendant herein; that NBC is a wholly owned and controlled subsidiary of RCA; that defendant RCA conducts its radio broadcasting, electrical transcription, and management of talent businesses through defendant NBC;

3. That the following individuals, officers or directors of the corporate defendants are named as defendants herein; that they have, during the period covered by this complaint, actively engaged in the management, direction and control of the affairs and policies of the corporate defendants and in particular those affairs and policies which are covered by this Complaint, and have authorized, ordered and done the acts of the defendants constituting the offenses hereinafter charged:

David Sarnoff, Chairman of the Board of Directors of NBC; President and member of the Board of Directors of RCA;
Niles Trammell, President and member of the Board of Directors of NBC;
William S. Hedges, Vice President of NBC;
Mark G. Woods, Vice President of NBC;
George Engles, Vice President of NBC.

II.

Description of the Radio Broadcasting Industry.

4. That a radio network system consists of two or more stations which broadcast the same program simultaneously, the program being transmitted to the stations comprising the network either from the station originating the program or from some other source over telephone wires usually leased from the American Telephone and Telegraph Company; that stations comprising a network are often referred to as "affiliated" with a network and their relations with the network are usually covered by the terms of so-called "affiliation contracts" entered into separately by each of the stations with the network company; that a broadcasting station may be affiliated with more than one network, and regardless of that affiliation may carry programs of other networks on a temporary or permanent basis by means of a wire line with such other network; that a network operation may be national or regional in scope; that at the time of the filing of this complaint there are in operation four national network systems in the United States; that two of said networks are operated by NBC, one by the Mutual Broadcasting System, hereinafter referred to as MBS, and one by the Columbia Broadcasting System, hereinafter referred to as CBS;

5. That programs transmitted by the networks to their affiliated stations are of two types namely "sustaining" or "commercial"; that "sustaining" programs are programs which are not sponsored or paid for by an advertiser, and include, among others, programs transmitted by the networks as a public service; that "commercial" programs are those which are sponsored and paid for, usually by an advertiser; that a broadcasting station affiliated with a national network is permitted to broadcast all of the network's "sustaining" programs; that such station may broadcast a "commercial" program carried by the network only upon the consent of the sponsor or advertiser; that

while a station affiliated with a network receives no revenue for broadcasting "sustaining" programs it is required to compensate the network whenever "sustaining" programs are carried where affiliation is with NBC or CBS; that stations affiliated with networks receive compensation only when they carry "commercial" programs;

6. That the nature of the radio spectrum is such that the number of broadcasting stations which can operate, the power they can utilize, the number and character of broadcasting stations available for participation in network broadcasting, and the facilities available for licensing are limited;

7. That an advertiser using the facilities of a nation-wide radio network is interested in securing the widest possible circulation and greatest number of listeners; that the circulation of an individual station participating in a network program depends on its geographic location, the power under which the station is authorized to operate, the frequency assigned to it, and its hours of operation; that the power employed by a broadcasting station determines the strength of its signal and affects the scope of the area it can serve; that the lower the frequency assigned the farther the station's signal will carry and the larger the area served;

8. That there are more than 800 commercial radio broadcasting stations in the United States which are operated under the authority of the Federal Communications Commission (hereinafter referred to as the FCC) pursuant to the Act of Congress known as the Communications Act of 1934, approved June 19, 1934, and prior acts of Congress; that in many cities and towns of the United States there are less than four broadcasting stations having comparable facilities; that in such cities and towns it is impossible for the four existing networks or for potential networks to secure affiliated station outlets where such available stations are controlled exclusively by existing

networks; that 105 cities and towns in the United States, each having a population in excess of 50,000, have three or less full-time commercial stations in each (list attached hereto as Exhibit A and made a part hereof);

9. That radio advertisers in whose behalf commercial radio programs are produced are of three types, namely, national advertisers using national network facilities, national advertisers using electrical transcriptions, and local advertisers sponsoring programs over local stations either through the medium of performance by live talent or through the reproduction of programs recorded upon electrical transcriptions; that a national advertiser may contract for the use of a station's time either by entering into contractual arrangements with the network with which the station is affiliated or by contracting directly with the several stations affiliated with the network; that the program of the national advertiser, using network facilities, must be produced through the performance of live talent present in the studio of the station originating the network broadcast; that the program of a national advertiser who does not use network facilities is usually produced by the reproduction of programs recorded upon electrical transcriptions; that electrical transcriptions are mechanical devices upon which programs are recorded or mechanically reproduced for the exclusive use of radio broadcasting stations;

III.

Position of Defendants in the Radio Broadcasting Industry.

10. That defendant RCA conducts its broadcasting business through defendant NBC; that NBC operates two nationwide broadcasting networks, known as the "Red" and the "Blue"; that both the "Red" and the "Blue" networks are composed of radio stations which form the "basic" network and others which are known as "supplemental" affiliates; that the basic "Red" network is composed of

23 stations either licensed to or affiliated with NBC and its key station is station WEAF, owned by NBC and located within the city and State of New York; that the "Blue" network is composed of 24 stations, either licensed to or affiliated with NBC, with its key station, WJZ, owned by NBC, and also located within the city and State of New York; that in addition there are more than 100 stations affiliated with NBC, which are not assigned to either basic network and which are supplemental to either the "Red" or the "Blue" network and are available to either of such networks at the option of the advertiser; that the affiliation contracts do not specify to which of the two networks any station is to be assigned; that NBC reserves the right to move any station from one network to the other even though affiliation with the "Red" network has proved much more remunerative to a station than affiliation with the "Blue" network;

11. That of 52 existing clear channel radio stations in the United States NBC owns, controls or has affiliated with it 32, and CBS 18; that most of the full-time regional stations are likewise affiliated with either NBC or CBS; that excluding low-powered local stations, more than half of all the stations in the country are affiliated with NBC and CBS; that of the 92 cities in the United States with more than 100,000 population, less than 63 have three or more full-time stations and less than 37 have four or more full-time stations; that there are more than 45 cities in the United States with a population in excess of 50,000 *served by* NBC or CBS or both, in which no other network can procure an independent full-time broadcasting station outlet because of the control exerted by NBC and CBS; that in over 20 cities of the United States, including Cleveland, Indianapolis, Houston, Birmingham, Providence, Des Moines, Albany, Charlotte and Harrisburg, other networks can procure only limited access to the existing radio broadcasting facilities;

12. That NBC is the direct operator and licensee under licenses issued by the FCC, of the following broadcasting stations having the call letters, power, and location as set out below:

Call Letters	Location	Power
WEAF	New York	50,000 Watts
WJZ	New York	50,000 "
WRC	Washington	5,000 "
WMAL	Washington	5,000 "
WTAM	Cleveland	50,000 "
WMAQ	Chicago	50,000 "
WENR	Chicago	50,000 "
KOA	Denver	50,000 "
KPO	San Francisco	50,000 "
KGO	San Francisco	7,500 "

13. That for the years 1938, 1939 and 1940, the net time sales for the entire radio industry were $117,379,459, $129,968,026, and $154,823,787, respectively, as compared with $35,611,145, $37,747,543, and $41,683,341 for NBC; $25,450,351, $30,961,499, and $35,630,063 for CBS; and $2,272,662, $2,610,969 and $3,600,161 for MBS;

14. That the power and dominant position of NBC and CBS are further shown by comparing the net operating income for the entire broadcasting industry with that of NBC and CBS; that for the years 1938, 1939 and 1940, the net operating income for the entire broadcasting industry was $18,854,784, $23,837,944, and $33,296,708, respectively, as compared with $4,137,503, $4,103,909, and $5,834,772 for NBC; and $4,329,510, $6,128,686, and $7,431,634 for CBS;

15. That the relative positions of NBC and CBS in the radio industry are apparent from the fact that in each of the years mentioned NBC and CBS have each enjoyed net profits in excess of the gross revenues of their only competitor in national network operations;

16. That broadcasting stations affiliated with NBC have in excess of 50% of the total combined night-time power of all stations in the United States; that stations affiliated with NBC and CBS have over 85% of the combined night-time power; that by reason of the dominant position in the industry of NBC and CBS, and because of the large volume of business controlled by them and the many advantages afforded radio stations through affiliation with them, a network affiliation or a continued network affiliation with either NBC or CBS is desired by practically all commercial radio broadcasting stations; that NBC and CBS have exercised the power inherent in their dominant position by imposing upon their respective affiliated broadcasting stations certain identical tying clauses which have prevented such stations from dealing with other competing network systems and have prevented NBC and CBS from dealing with radio stations other than their regular network affiliated stations; that both NBC and CBS have optioned all, or a part, of their respective affiliated stations' time on the air, a substantial portion of which is never used by either network; that CBS as well as NBC, has entered into contracts of several years duration with each of its affiliated stations, and is the owner, operator and licensee of radio stations located in lucrative marketing areas;

IV.

Jurisdiction and Venue.

17. That this Complaint is filed and the jurisdiction of this Court invoked to obtain equitable relief against defendants Radio Corporation of America, National Broadcasting Company, and certain of the officers and members of the Boards of Directors thereof, because of their violations, jointly and severally, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act;

18. That the unlawful combination and conspiracy hereinafter described to restrain commerce among the several

states of the United States has been carried on in part within the Northern District of Illinois, Eastern Division, and many of the unlawful acts pursuant thereto have been performed by defendants and their representatives in said District; that the interstate commerce in radio broadcasting, electrical transcriptions and talent, as hereinafter described, is carried on in part within said District; that both said corporate defendants have usual places of business in said District and there transact business and are within the jurisdiction of this Court for the purpose of service;

V.

Interstate Commerce.

a. Radio Broadcasting.

19. That radio broadcasting stations, including network broadcasting systems in the United States, are engaged in commerce among the several states of the United States, the District of Columbia and within the Northern District of Illinois, Eastern Division; that each station is an instrumentality through which energy, ideas and entertainment are transmitted across state or national boundaries to radio listeners in the United States, the District of Columbia, and foreign countries;

b. Electrical Transcriptions.

20. That more than 50% of the electrical transcriptions produced in the United States for the exclusive use of radio broadcasting is produced or manufactured in the States of New York and California and shipped to radio broadcasting stations located throughout the United States, the District of Columbia and within the Northern District of Illinois, Eastern Division; that a substantial portion of the time devoted to radio broadcasting by the radio broadcasting stations is consumed by the broadcasting of intelligence, entertainment and information recorded upon electrical transcriptions;

c. Talent.

21. That a substantial portion of radio stations' time on the air, including that of networks, is devoted to the broadcasting of performances by artistic talent, including musicians, virtuosi, speakers, comedians, announcers, news commentators and actors; that the radio broadcasting of talent by radio broadcasting stations and network systems is effected through performances at the studios of particular broadcasting stations or at places in close proximity thereto and transmitted across state or national boundaries through the medium of radio signals and telephone wires for rebroadcasting purposes;

22. That the creation of a public demand for the services of any individual possessing any form of talent requires some medium of public expression; that radio broadcasting is one of the principal mediums through which talent is brought to the attention of the public and a demand for such talent created thereby;

VI.

The Combination and Conspiracy.

23. That the defendants named herein together with affiliated broadcasting stations, each well knowing the matters and things hereinbefore alleged, for many years preceding the filing of this Complaint and continuing to the date of the filing hereof, have been engaged in the United States, and within the Northern District of Illinois, Eastern Division, in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid interstate commerce and in a wrongful and unlawful combination and conspiracy to attempt to monopolize the aforesaid interstate commerce in radio broadcasting, electrical transcriptions and talent, in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (15 U. S. C. A. 1 and 2), and have conspired

to do all acts and things and to use all means necessary and appropriate to make said restraints and attempts to monopolize effective, including the means, acts and things hereinafter more particularly alleged;

24. That one of the purposes of the conspiracy was to procure, monopolize, and keep within the control of the defendants herein, to the greatest extent possible and to the exclusion of other persons and corporations, the business of conducting national radio network operations and to suppress competition in all phases of such operations, including competition in securing national radio advertisers; that as a part of said combination and conspiracy the defendants have arranged and agreed among themselves to do and have done the following things:

(a) To require radio stations affiliated with NBC to execute affiliation contracts containing clauses which by their terms have forbidden said broadcasting stations from accepting any programs from any other national network (a copy of such contract clause is attached hereto as "Exhibit B", and made a part hereof);

(b) To refuse to furnish NBC network programs to radio stations not regularly affiliated with NBC, even though the regularly affiliated station covering substantially the same area is not broadcasting such programs, thereby preventing many radio listeners from hearing and enjoying NBC network programs that would otherwise be available;

(c) To require radio stations affiliated with NBC to execute affiliation contracts containing so-called option time clauses. These clauses usually provide that upon 28 days' notice the network may exercise the option to use any part of specified hours of the affiliated stations' time on the air as the network may desire. The specified hours optioned by NBC usually include substantially all of the more desirable broadcasting time of the affiliated stations. A typical option time clause is attached hereto marked "Exhibit C", and made a part hereof;

(d) To suppress competition among radio networks in the sale to advertisers of time on the air by optioning all of the more desirable time of affiliated stations, which options may be exercised upon 28 days' notice. The value of a program to a radio advertiser depends largely on its continuation for such period of time as to familiarize the listening public with the program, the local station over which it is broadcast, and the time of the broadcast. The necessary effect, therefore, of such option time contracts has been to prevent any other network from competing with NBC in the furnishing of network programs, or in arranging network broadcasts on behalf of network advertisers to such stations during the stations' more desirable time on the air optioned to NBC, even though substantial portions of the affiliated stations' time optioned to NBC has not been purchased by NBC for the broadcasting of commercial programs;

(e) To suppress competition between NBC and its affiliated radio stations in securing commercial radio advertisers through NBC's practice of optioning a substantial part of its affiliated stations' more desirable time on the air, thereby vesting in NBC rather than in the affiliated stations the power to make satisfactory commitments with radio advertisers as to the desired portion of the affiliated stations' time;

(f) To prevent affiliated stations from entering into any commitments with local radio sponsors or advertisers for the more desirable hours for periods longer than 28 days, even though NBC does not exercise its option to use such time;

(g) To suppress competition between NBC and electrical transcription manufacturers in securing commercial radio advertisers for stations affiliated with NBC through exercise by NBC of its option on the affiliated stations' time on the air in such manner as to prevent electrical transcription manufacturers or advertisers desiring to use electrical transcriptions for broadcasting purposes

from securing satisfactory commitments as to desire radio time and as to geographic distribution directly with the radio stations affiliated with NBC;

(h) To suppress competition with other network systems in securing network station outlets by requiring affiliated stations to execute long term contracts. The FCC issues licenses for station operation for periods not longer than two years. The affiliation contracts between NBC and its affiliated stations are for periods of five years or more. The stations affiliated with NBC have been forced to sign these long term contracts because of the dominant position in the broadcasting industry enjoyed by NBC, and because CBS, its chief competitor, forces its affilated stations to sign similar long term contracts;

(i) To suppress the development of existing and potential radio network systems by entering into the aforesaid "tying" affiliation contracts with stations located in substantially all of the more lucrative marketing areas where the number of radio broadcasting stations available for network systems is limited, well knowing that their major competitor, CBS, is pursuing a similar policy;

(j) To acquire complete ownership and control of radio stations located in certain cities and towns in which the number of broadcasting stations having comparable radio facilities is insufficient to permit other national network operations to use exclusively the facilities of one of such stations;

(k) To fix the price to be charged radio advertisers and advertising agencies for the sale of their affiliated stations' time on the air;

(l) To make station outlets unavailable to other networks and to suppress the development of additional national network systems by operating two of the four existing national network systems, thereby monopolizing

many of the limited number of radio stations available for network systems;

(m) To operate two of the four existing national network systems in a noncompetitive manner under the joint ownership, control and management of defendants;

(n) To refuse to designate in the contracts of affiliation with radio stations whether said stations will be affiliated with the "Red" or the "Blue" networks of NBC; to discriminate against the operations of the "Blue" and the stations receiving programs therefrom by routing to the greatest extent possible all commercial programs over the facilities of the NBC "Red", thereby making the operations of the "Red" and an affiliation therewith far more lucrative than the operations of the "Blue" and an affiliation therewith, and vesting in the defendants the power to shift a station from the far more remunerative "Red" to the far less remunerative "Blue" or vice versa at any time, regardless of the station's wishes;

(o) To use the power to shift an affiliated station from the far more remunerative "Red" to the less remunerative "Blue" as a threat against affiliated stations not operating according to the wishes of the defendants;

(p) To suppress competition between defendants and the other two national networks in the sale of time to radio advertisers and advertising agencies through the operation of two network systems by so manipulating the two networks as: To allow discounts to advertisers based upon the amount of business such advertisers do over both networks of NBC, thereby giving the "Blue", for example, a marked advantage over the other networks in securing the business of a national advertiser who is already sponsoring a program over the facilities of the "Red"; to allow NBC to arrange certain of its most attractive facilities into one combination in the event an advertiser cannot otherwise be satisfied; and to allow NBC an advantage over other networks in terms of pro-

gramming since NBC has approximately twice as many hours at its disposal as either of the other two national networks;

(q) To utilize the "Blue" to forestall competition between the "Red" and other networks in securing network outlets by tying up two of the best radio stations in lucrative markets through the ownership of stations, or through long term contracts containing exclusive and optioned time provisions;

(r) To refuse to allow electrical transcription manufacturers to connect with radio studios for recording purposes other than the studios of the station originating the network program even though the advertiser in whose behalf the program is being broadcast desires and has contracted for the services of the electrical transcription manufacturers;

(s) To enter into management contracts, either directly or through affiliated companies, with many artists, including a substantial number of the best known and most popular broadcasting artists in the United States. Such contracts usually provide that the managing company shall have the exclusive right to determine the use to be made of the services of such artists, and that the managing company shall receive a specified percentage of the revenue paid for the artists' services from any and all sources, including services not related to radio broadcasting. The artists have submitted to the terms of such management contracts and have refused to contract with so-called independent concert or artist management agencies because of defendants' power to popularize talent through performance over radio networks to a degree not enjoyed by any other management services;

(t) To utilize the power of popularization of talent through performance over radio to the detriment of talent not under their control and of other talent management services, through performance of their exclusively man-

aged and controlled talent over the two networks operated by defendants to the greatest extent possible, and by insisting that the advertisers and advertising agencies using time on defendants' networks likewise use the services of talent under contract to defendants;

(u) To engage in the manufacture and sale of electrical transcriptions to affiliated stations over which they have acquired power of control in competition with others who are similarly engaged in the manufacture and sale of electrical transcriptions to said stations."

VII.

Effect of Conspiracy.

25. That the defendants have adopted the means and engaged in the activities aforesaid, with the intent, purpose, and effect of unreasonably and unlawfully suppressing competition in the conduct and development of national radio network systems, and have otherwise unreasonably restrained and attempted to monopolize interstate commerce in radio broadcasting, electrical transcriptions and talent; that their activities aforesaid have prevented unknown thousands of radio listeners from hearing and enjoying radio network programs that otherwise would have been available and have affected the quality of radio network programs which could be expected to flow from a competitive radio broadcasting industry;

26. That there are unknown thousands of individuals in the United States possessing talent of a unique nature many of whom would no doubt rise to national prominence if given an equal opportunity for popularization over the radio; that the number and importance of talent management services existing in the United States are gradually diminishing because of the competitive advantages in the talent management field enjoyed by defendants through the joint operation of talent management services and radio network systems;

27. That the radio stations affiliated with defendants in the operation of national networks have substantial investments of money, credits and property in their businesses and said investments and businesses would be greatly reduced in value or destroyed if defendants, because of their dominant position in the industry, refused to allow such stations to continue a network affiliation;

28. That the ownership by defendants of an electrical transcription company constitutes in itself an unreasonable restraint of trade insofar as their affiliates are concerned because defendants control a substantial portion of the limited radio facilities of the nation, and effectively control substantially all the operations of their affiliated stations.

29. That the power of defendants, the competitive advantages enjoyed by them, the unreasonable restraints of interstate commerce inherent in the ownership and operation of two national network systems and of radio stations located in cities and towns in which there are less than four radio stations with comparable facilities, the ownership of an electrical transcription company, and the ownership of a talent management service, are such that they are subject to abuses which can be corrected only by a severance of these ownerships and controls.

VIII.

Prayer.

Wherefore, the complainant prays:

1. That summons issue to each of the defendants, commanding said defendants to appear herein and to answer the allegations contained in this complaint and to abide by and perform such orders and decrees as the Court may make in the premises;

2. That upon final hearing of this cause, the Court order, adjudge and decree that the conspiracy and wrongs herein described exist and constitute an unreasonable restraint of trade and commerce among the various states and the District of Columbia;

3. That the defendants be required to elect which of the two national networks, the "Red" or the "Blue", they desire to continue to operate, and that a receiver be appointed to receive forthwith any stock and share capital owned by Radio Corporation of America, National Broadcasting Company, any subsidiary company or any officer thereof, which represents the ownership of the network which defendants elect not to operate, including any stock of defendants representing the ownership of radio stations located in cities and towns in which there are less than four radio stations with comparable facilities, including electrical transcription and talent management operations, and that defendants be thereupon ordered forthwith to transfer the aforesaid stock and share capital to the aforesaid receiver; that the aforesaid receiver upon receiving the aforesaid stock and share capital offer such operations for sale and sell the same, holding the proceeds subject to the order of the Court; that in the event there is no stock and share capital of a severable nature representing ownership of the above named operations, the Court require defendants to sever their ownership, operation and control of the above named properties in such manner and form as the Court shall deem just and proper;

4. That the defendants and each and all of their respective officers, managers, agents, employees, and all persons acting or claiming to act on behalf of defendants be enjoined and restrained from entering into any contract, agreement, conspiracy, or otherwise to do the following acts and things:

(a) To exercise any right or power to prevent affiliated radio stations from accepting any program from any other network during such stations' time on the air which is not being used by defendants;

(b) To refuse to furnish NBC network programs to radio stations covering substantially the same area as the regularly affiliated stations in a nondiscriminatory

manner, when the regularly affiliated station does not broadcast such programs;

(c) To prevent or hinder the affiliated stations from scheduling programs before the defendants finally agree to use the time during which such programs are scheduled, or from requiring the station to clear time already scheduled for use, either through the medium of live talent or electrical transcriptions, when the defendants seek to use the time;

(d) To enter into or assert any contract of affiliation with any radio station for a period longer than two years;

(e) To prevent or hinder their affiliated stations from fixing the price at which said stations shall respectively sell or offer for sale time on the air, free from any influence or pressure exerted by defendants;

(f) To refuse to allow electrical transcription manufacturers reasonable access to radio studios, including the studios of the stations not originating the network program, for recording purposes when desired by the advertiser in whose behalf the program is being broadcast;

5. That the complainant recover the costs and disbursements of this suit;

6. That the complainant shall have such other and further relief as the Court shall deem just and proper.

DANIEL B. BRITT,
VICTOR O. WATER,
Special Assistants to the Attorney General.

FRANCIS BIDDLE,
Attorney General

THURMAN ARNOLD,
Assistant Attorney General

J. ALBERT WOLL,
United States Attorney

Exhibit A

Summary of Metropolitan Districts in the United States Having a Population in Excess of 50,000, Having Three or Less Full-Time Commercial Stations and Showing the Population and Total Number of Full-Time Commercial Stations in Each.

THREE FULL-TIME COMMERCIAL STATIONS

Metropolitan District	Population	Total Number of Full-time Commercial Stations
Cleveland, O.	1,214,943	3
Milwaukee, Wis.	790,336	3
Houston, Tex.	510,397	3
Rochester, N. Y.	411,970	3
Birmingham, Ala.	407,851	3
Youngstown, O.	372,428	3
Akron, O.	349,705	3
Worcester, Mass.	306,194	3
Omaha-Council Bluffs, Nebr.-Ia.	287,698	3
San Diego, Cal.	256,368	3
Miami, Fla.	250,537	3
Richmond, Va.	245,674	3
Nashville, Tenn.	241,769	3
Salt Lake City, Utah	204,488	3
Jacksonville, Fla.	195,619	3
Chattanooga, Tenn.	193,215	3
Tulsa, Okla.	188,562	3
Des Moines, Ia.	183,973	3
Duluth-Superior, Minn.-Wis.	157,098	3
Knoxville, Tenn.	151,829	3
Beaumont-Port Arthur, Tex.	138,608	3
Wichita, Kans.	127,308	3
Little Rock, Ark.	126,724	3
Phoenix, Ariz.	121,828	3
Shreveport, La.	112,225	3
Springfield, Mo.	70,514	3

Two Full-Time Commercial Stations

Metropolitan District	Population	Total Number of Full-time Commercial Stations
Columbus, O.	365,796	2
Toledo, O.	341,663	2
Lowell-Lawrence-Haverhill, Mass.	334,969	2
Allentown-Bethlehem-Easton, Pa.	325,142	2
Norfolk-Portsmouth-Newport News, Va.	323,326	2
Fall River-New Bedford, Mass.	272,648	2
Dayton, O.	271,513	2
Bridgeport, Conn.	216,621	2
Grand Rapids, Mich.	209,873	2
Wheeling, W. Va.	196,340	2
Wilmington, Del.	188,974	2
Davenport-Rock Island-Moline, Ia.-Ill.	174,995	2
Harrisburg, Pa.	173,367	2
Huntington-Ashland, W. Va.-Ky.	170,979	2
Sacramento, Cal.	158,999	2
Waterbury, Conn.	144,822	2
Evansville, Ind.	141,614	2
Charleston, W. Va.	136,332	2
Fort Wayne, Ind.	134,385	2
Erie, Pa.	134,039	2
Savannah, Ga.	117,970	2
El Paso, Tex.	115,801	2
Mobile, Ala.	114,906	2
Charlotte, N. C.	112,986	2
Roanoke, Va.	110,593	2
Winston-Salem, N. C.	109,833	2
Portland, Me.	106,566	2
Atlantic City, N. J.	100,096	2
Charleston, S. C.	98,711	2
Fresno, Cal.	97,504	2
Montgomery, Ala.	93,697	2
Columbia, S. C.	89,555	2
Springfield, Ill.	89,484	2
Lincoln, Nebr.	88,191	2

Metropolitan District	Population	Total Number of Full-time Commercial Stations
Jackson, Miss.	88,003	2
Augusta, Ga.	87,809	2
Sioux City, Ia.	87,791	2
Manchester, N. H.	81,932	2
Asheville, N. C.	76,324	2
Macon, Ga.	74,830	2
Corpus Christi, Tex.	70,677	2
Amarillo, Tex.	53,463	2
One Full-Time Commercial Station		
New Haven, Conn.	308,228	1
Canton, O.	200,352	1
Trenton, N. J.	200,128	1
Utica-Rome, N. Y.	197,128	1
Flint, Mich.	188,554	1
Reading, Pa.	175,355	1
Peoria, Ill.	162,566	1
Saginaw-Bay City, Mich.	153,388	1
Johnstown, Pa.	151,781	1
South Bend, Ind.	147,022	1
Binghamton, N. Y.	145,156	1
Racine-Kenosha, Wis.	135,075	1
Lancaster, Pa.	132,037	1
San Jose, Cal.	129,367	1
Altoona, Pa.	114,094	1
Lansing, Mich.	110,356	1
Austin, Tex.	106,193	1
Rockford, Ill.	105,259	1
York, Pa.	92,627	1
Columbus, Ga.	92,478	1
St. Joseph, Mo.	86,991	1
Berkeley, Cal.	85,547	1
Terre Haute, Ind.	83,370	1
Stockton, Cal.	79,337	1
Madison, Wis.	78,349	1
Topeka, Kans.	77,749	1
Springfield, O.	77,406	1

Metropolitan District	Population	Total Number of Full-time Commercial Stations
Kalamazoo, Mich.	77,213	1
Cedar Rapids, Ia.	73,219	1
Greensboro, N. C.	73,055	1
Galveston, Tex.	71,677	1
Waco, Tex.	71,114	1
Durham, N. C.	69,683	1
Decatur, Ill.	65,764	1
Pueblo, Colo.	62,039	1
NO FULL-TIME COMMERCIAL STATIONS		
Hamilton-Middletown, O.	112,686	0
Waterloo, Ia.	67,050	0

Exhibit B

Typical Exclusive Clause of NBC.

"For the purpose of eliminating confusion on the part of the radio audience as to the affiliation and identity of the various individual stations comprising radio networks, you agree not to permit the use of your station's facilities by any radio network, other than ours, with which is permanently or occasionally associated any station serving wholly or partially a city or county of one million or more inhabitants."

Exhibit C

Typical Option Time Provision of NBC.

"Upon 28 days' notice, your station will broadcast network commercial programs for NBC during any periods requested by NBC within the hours designated below as Network Optional Time, provided, that because of your public responsibility your station may reject a network program the broadcasting of which would not be in the public interest, convenience and necessity.

"Network optional time will be as follows:

"Weekdays (New York City Time)	Sundays
10:00 A.M.—12:00 Noon	1:00— 4:00 P.M.
3:00 P.M.— 6:00 P.M.	5:00— 6:00 P.M.
7:00 P.M.— 7:30 P.M.	7:00—11:00 P.M."

APPENDIX D.

Excerpts from Legislative History of the Radio Act of 1927 and the Communications Act of 1934

There is set forth below the text of portions of the legislative history of the Radio Act of 1927 and the Communications Act of 1934 referred to in the brief but not there quoted in full. This appendix is to be read in connection with the pages of the brief which are mentioned below.

I.

Legislative History of the Disposition of the Power Over Monopoly in the Radio Act of 1927

At page 58 of the brief reference is made to Section 2 (C) of H. R. 13773, 67th Cong. 4th Sess. (1923). The language referred to reads as follows:

"C. The Secretary of Commerce, subject to the limitations of this act, in his discretion, may grant to any applicant therefor a station license provided for in sections 1 and 2 hereof.

"No license granted by the Secretary shall be for a longer term than 10 years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license the Secretary, in his discretion, upon application thereof, may grant a renewal of such license for the same or for a lesser period of time.

"The Secretary of Commerce is hereby authorized to refuse a station license to any person, company, or corporation, or any subsidiary thereof, which, in the judgment of the Secretary, is monopolizing or seeking to monopolize radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus or by any other means. The granting of a license shall not estop the United States from prosecuting such person, company, or corporation for a violation of the law against monopolies or restraint of trade."

At page 59 of the brief reference is made to Section 2 (C) of H. R. 7357, 68th Cong., 1st Sess. (1924). The language referred to reads as follows:

"(C) The Secretary of Commerce, if in his judgment public convenience, interest, or necessity will be served thereby, and subject to the limitations of this act, may grant to any applicant therefor a station license provided for in sections 1 and 2 hereof.

"No license granted by the Secretary shall be for a longer term than ten years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license the Secretary, in his discretion, upon application therefor, may grant a renewal of such license for the same or for a lesser period of time.

"The Secretary of Commerce is hereby directed to refuse a station license to any person, company, or corporation, or any subsidiary thereof, which in his judgment is unlawfully monopolizing or seeking to unlawfully monopolize radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means. The granting of a license shall not estop the United States from prosecuting such person, company or corporation for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade."

At page 59 of the brief reference is made to Section 2 (G) of H. R. 7357, 68th Cong., 1st Sess. (1924) (*cf.* Section 313 of the Communications Act of 1934), reading as follows:

"(G) All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought

under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such acts or any of them, the court, in addition to the penalties imposed by said acts, may adjudge, order, or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court, and the provision of said order, decree, or judgment revoking such license shall not become effective until such appeal or review shall have been finally disposed of."

On pages 59 and 63 of the brief reference is made to testimony of Secretary of Commerce Hoover in hearings before the Committee on the Merchant Marine and Fisheries, House of Representatives, 68th Cong., 1st Sess. on H. R. 7357 (1924). The part of the testimony of Secretary of Commerce Hoover referred to reads as follows:

"There are one or two points in the bill before the committee to which I would like to refer in more detail.

"Under the 1912 law, it has been held that the Secretary of Commerce has no discretion in the granting of licenses to stations. It is now obligatory to grant a license to every applicant irrespective of the interference which may be anticipated from the operation of the station. The present bill grants a discretionary power to be exercised in accordance with the public interest. I believe this is necessary in order that there shall be no question of vested right in the use of the ether.

"Section 2(c) of the bill provides that the Secretary of Commerce shall refuse a license to any concern which

is monopolizing or attempting to monopolize radio communication through control of the manufacture of apparatus or otherwise. I am in sympathy with the purpose shown in the paragraph to which I am referring; but I do not believe that the method there adopted is the proper one. The determination of whether or not a given concern is attempting to set up an illegal monopoly in radio communication is dependent upon the ascertainment of a vast number of facts, and the determination of difficult legal questions. We have a conflict between the general American principle of opposition to monopoly and an equally American principle, recognized by our patent laws, that an invention belongs exclusively to him who makes it, which necessarily means an exclusive right in the inventor. The problem does not properly belong to any administrative body.

"The Department of Commerce has no machinery with which to carry on the investigation necessary, nor is its organization suited for the decision of such questions. I much prefer the principle adopted in section 2 (g) under which the law and facts applicable are determined judicially, and I would suggest that the bill be so amended that the refusal of a license to a monopoly be placed upon the same basis, and determined in the same manner as is the revocation of a license under this section.

"One of the great difficulties in the regulative efforts of the department heretofore has been and will continue to be the lack of funds under the appropriations made for that purpose. The attempts to police 20,000 stations in this country with a total force of 29 inspectors is obviously an absurdity.

"The need for radio legislation is imperative although no law will be a panacea for all radio ills. The bill which you are now considering is a valuable step in the proper direction and, excepting as I have above indicated, I heartily commend it to your favorable consideration." (page 11)

On page 59 of the brief reference is made to Section 2 (C) of H. R. 5589, 69th Cong., 1st Sess. (1925). The section reads as follows:

"(C) The Secretary of Commerce, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this act, may grant to any applicant therefor a station license provided for in sections 1 and 2 hereof.

"No license granted by the Secretary shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license the Secretary, in his discretion, upon application therefor, may grant from time to time renewals of such license for a like term.

"The Secretary of Commerce is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person, firm, company, or corporation, or any subsidiary thereof, which has been found guilty by any Federal court of unlawfully monopolizing or attempting to unlawfully monopolize radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means. The granting of a license shall not estop the United States or any person aggrieved from prosecuting such person, firm, company, or corporation for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade."

On page 48 of the brief, reference is made to Section 13 of the Radio Act of 1927. The Section reads as follows:

"Sec. 13. The licensing authority is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person, firm, company, or corporation, or any subsidiary thereof, which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlaw-

fully to monopolize, after this Act takes effect, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person, firm, company, or corporation for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such firm, company, or corporation."

II.

Attempts by Congressional Minority to Give the Commission Power to Determine the Facts of Monopoly

At page 59 of the brief reference is made to a series of amendments by the Congressional minority desiring that the licensing authority be given jurisdiction to determine the facts of monopoly, which were uniformly rejected.

One of these amendments appears at 67 Cong. Rec., Part 5, page 5557:

"• • • strike out the words 'The Secretary of Commerce may grant station licenses only upon written application therefor addressed to him, which application shall set forth such facts as he by,' and insert in lieu thereof the following:

'No license shall be issued under the provisions of this act unless the applicant shall have first filed in duplicate with the Secretary of Commerce and with the commission a written application therefor, accompanied by a statement in writing under oath or affirmation, containing copies of all traffic and other contracts in writing, and the substance of any and all other agreements or arrangements not in writing, between the applicant and any other person, firm, company, or corporation engaged

in the business of transmitting for pay or profit by wire or wireless intelligence, signals, visual images, or other communications, or in the manufacture, use, purchase, sale, and/or operation of apparatus, patented or unpatented, for the transmission and/or reception by wire and/or wireless of intelligence, signals, visual images, or other communications, and/or for the acquisition, purchase, use or sale of patents, patent rights, and licenses, and disclosing all shares of the capital stock or other share capital of/or interest owned by the applicant, directly or indirectly, or held, directly or indirectly, for such applicant's benefit in any corporation, association, firm, or person engaged in the manufacture, use or sale of apparatus or devices for wire or wireless transmission or communication, or in the business of transmitting by wire or wireless intelligence, signals, visual images, or other communications, and including such other facts as the Secretary of Commerce and/or the commission by,' "

This was rejected, *ibid.*, page 5560.

Another of these amendments appears at 67 Cong. Rec., Part 5, page 5561:

" 'On the information disclosed by the applicant in connection with his application as provided by subsection D, and upon such other proof as may appear, the commission shall determine whether or not the applicant is directly or indirectly in violation of the laws of the United States monopolizing or attempting to monopolize interstate or foreign commerce, or is engaged, directly or indirectly, in a violation or in an attempt to violate the laws of the United States against combinations, contracts, or agreements in restraint of trade; in the transmission by wireless for pay or profit intelligence, signals, visual images, or other communications; in the acquisition, sale, or use of patents, patent rights, and/or licenses for wireless inventions and discoveries; in the purchase, manufacture, sale, use, and/or operation of apparatus,

whether patented or unpatented, for the transmission and/or reception by wireless of intelligence, signals, visual images, or other communications. If said commission determines that as a matter of law or as a mixed question of law and fact said applicant is violating the laws of the United States in any of the above respects, it shall certify such finding to the Secretary of Commerce, and the latter shall refuse to grant the license applied for. A copy of the decision of the commission shall be served on the applicant, who shall thereupon have a right to a hearing before the commission and at which any party interested shall be entitled to be represented by counsel, and to submit such further evidence, oral or written, as may be material and competent. After said hearing the commission shall make its decision in writing, setting forth its findings of fact and rulings of law; and if it finds that the applicant is violating the laws of the United States in any of the above respects, it shall certify such finding to the Secretary of Commerce, and the latter shall refuse to grant said license. Any applicant for a license aggrieved by a decision of the commission shall have a right of appeal from the decision of the commission to the Court of Appeals of the District of Columbia, and the commission shall, upon notice of the entry of the appeal, certify under the signature and seal of the commission a copy of its decision stating its conclusions of fact and the rules of law applied in arriving at its decision, together with the evidence, if requested, upon which it based its decision. Upon all questions of fact the decision of the commission shall be final, but said court of appeals shall have the power of revision of the decision of the commission on all questions of law, and its decision thereon shall be final. During the pendency of any appeal to said court of appeals the commission shall have authority, in its discretion, if it deems the law to be doubtful and so declares in its opinion, to authorize the Secretary of Commerce to grant a license to the applicant upon such terms and conditions as it deems consistent with public interest, but upon a decision by the court of

appeals that said applicant is guilty on the facts found by the commission of violating the laws of the United States in any of the above respects, said license shall forthwith be revoked.' "

This amendment was rejected, *ibid.*, page 5563.

See also 67 Cong. Rec., Part 5, pages 5564-5.

Another attempted amendment appears at 67 Cong. Rec., Part 5, page 5565, and reads as follows:

" 'Sec. . The Federal radio commission shall also have all the powers to investigate and regulate and all the duties of investigating and/or regulating persons, firms, companies, and corporations engaged in interstate or foreign commerce in the business of transmitting for pay or profit by wireless intelligence, signals, visual images, or other communications, in the acquisition and sale of patents, patent rights, and licenses, for wireless inventions or discoveries, and/or in the use, purchase, sale, and/or operation of apparatus, patented or unpatented, for the transmission and/or reception by wireless of intelligence, signals, visual images, or other communications which the Interstate Commerce Commission has to investigate and regulate common carriers under "an Act to regulate commerce approved February 14, 1887," and all acts amendatory thereof and supplementary thereto. Excepting as otherwise provided by this act, in all proceedings under this section the procedure, including service of process, returns, hearings, attendance of witnesses, depositions, orders, and enforcement thereof and other methods, shall or may be the same as that prescribed or otherwise in proceedings before the Interstate Commerce Commission, and the jurisdiction of the courts with respect to proceedings under this section shall be like their jurisdiction over proceedings before the Interstate Commerce Commission.' "

This amendment was thrown out on a point of order. See also 67 Cong. Rec., Part 5, pages 5568-71, 5584.

At 67 Cong. Rec., Part 11, page 12507, appears the following amendment, which was also rejected:

"(f) On the information disclosed by the applicant in his application, the commission shall determine if the applicant, or any corporation or association affiliated therewith, through stock control or otherwise, is engaged directly or indirectly in a violation or in an attempt to violate the antitrust laws or the Federal Trade Commission act, approved September 26, 1914, as amended. If the commission determines that the applicant is so engaged, it shall serve notice of its determination upon the applicant by registered mail and give him due notice and opportunity for public hearing in respect of such determination. At the hearing the applicant shall be entitled to be represented in person or by counsel, and to submit further evidence, oral or written, in respect of the violation. After such hearing, or opportunity therefor, the commission shall make its decision in writing, setting forth its findings of fact and rulings of law. If the Commission finds that the applicant is engaged in any violation of or in an attempt to violate any such antitrust law or the Federal Trade Commission act, as amended, the commission shall refuse the issuance of the license."

III.

The Textual Development of Section 303 of the Communications Act of 1934

On page 63 of the brief reference is made to Section 1 (B) of H. R. 5589, 69th Cong., 1st Sess. (1925). The text of the language summarized reads as follows:

"(B) The Secretary of Commerce, from time to time, as public convenience, interest, or necessity, requires, shall (a) classify licensed radio stations and the operators required therein; (b) prescribe the nature of the service to be rendered by each class and each station within any class; (c) assign bands of frequencies or wave lengths to the various classes of stations and assign frequencies or

wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate; (d) determine the location of classes of stations or individual stations and the kind of instruments to be used, with respect to their external effects; (e) regulate the purity and sharpness of the emissions from each station and of the apparatus therein; (f) establish areas or zones to be served by any station; (g) from time to time inspect licensed stations and their apparatus; (h) make such regulations not inconsistent with law as he may deem necessary to prevent interference between stations and to carry out the provisions of this act: *Provided, however,* That changes in the call letters, wave lengths, authorized power, in the character of emitted signals, or in the times of operation of any station shall not be made without the consent of the station licensee unless in the judgment of the Secretary such changes are required as a public necessity or in the public interest. The Secretary shall have authority to exclude from the requirements of any regulations any radio station upon railroad trains and the operators required therein, or to modify such regulations in his discretion: *Provided,* That such stations shall not be used for sending communications or signals for hire."

On pages 64 and 65 of the brief reference is made to Section 4 of the Radio Act of 1927, which reads as follows:

"SEC. 4. Except as otherwise provided in this Act, the commission, from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies or wave lengths to the various classes of stations, and assign frequencies or wave lengths for each individual station and determine

the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the wave lengths, authorized power, in the character of emitted signals, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, in the judgment of the commission, such changes will promote public convenience or interest or will serve public necessity or the provisions of this Act will be more fully complied with;

(g) Have authority to establish areas or zones to be served by any station;

(h) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(i) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(j) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(k) Have authority to hold hearings, summon witnesses, administer oaths, compel the production of books, documents, and papers and to make such investigations

as may be necessary in the performance of its duties. The commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding, as may be necessary for the execution of the functions vested in the commission and, as from time to time may be appropriated for by Congress. All expenditures of the commission shall be allowed and paid upon the presentation of itemized vouchers therefor approved by the chairman."

On page 65 of the brief reference is made to Section 303 of the Communications Act of 1934, which, as originally enacted, reads as follows:

"SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this

Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified;

(m) Have authority to suspend the license of any operator for a period not exceeding two years upon proof sufficient to satisfy the Commission that the licensee (1) has violated any provision of any Act or treaty binding on the United States which the Com-

mission is authorized by this Act to administer or any regulation made by the Commission under any such Act or treaty; or (2) has failed to carry out the lawful orders of the master of the vessel on which he is employed; or (3) has willfully damaged or permitted radio apparatus to be damaged; or (4) has transmitted superfluous radio communications or signals or radio communications containing profane or obscene words or language; or (5) has willfully or maliciously interfered with any other radio communications or signals;

(n) Have authority to inspect all transmitting apparatus to ascertain whether in construction and operation it conforms to the requirements of this Act, the rules and regulations of the Commission, and the license under which it is constructed or operated;

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation."

On page 65 of the brief reference is made to amendments to Section 303 of the Communications Act of 1934. Those amendments were contained in Sections 5 and 6 of an Act to amend the Communications Act of 1934, 75th Cong., 1st Sess., reading as follows:

"SEC. 5. Paragraph (m) of section 303 of the Communications Act of 1934 is hereby amended to read as follows:

'(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee——

'(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

'(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

'(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

'(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

'(1) false or deceptive signals or communications, or

'(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

'(E) has willfully or maliciously interfered with any other radio communications or signals; or

'(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

'(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have

fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.' "

"SEC. 6. (a) Subsection (n) of section 303 of the Communications Act of 1934 is hereby amended to read as follows:

'(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.'

(b) Section 303 of the Communications Act of 1934 is hereby further amended by adding at the end thereof a new subsection to read as follows:

'(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.' "

IV.

The Legislative History of Section 303(i) of the Communications Act of 1934

On page 69 of the brief reference is made to a colloquy between Senator Dill and Stephen B. Davis, Jr. in hearings before the Committee on Interstate Commerce of the Senate, 69th Cong., 1st Sess., on S. 1 and S. 1754 (1926). The colloquy appears at pages 123-124 of those hearings and reads as follows:

"Senator DILL. I want to ask Judge Davis a question about another subject not covered in this bill, but which I want to have considered; and that is the subject of chain broadcasting. During the past few months there has grown up a system of chain broadcasting, extending over the United States a great deal of the time. I say a great deal of the time—many nights a month—and the stations that are connected are of such widely varying meter lengths that the ordinary radio set that reaches out any distance is unable to get anything but that one program, and so, in effect, that one program monopolizes the air. I realize it is somewhat of a technical engineering problem, but it has seemed to many people, at least many who have written to me, that when stations are carrying on chain programs that they might be limited to the use of wave lengths adjoining or near enough to one another that they would not cover the entire dial. I do not know whether legislation ought to restrict that or whether it had better be done by regulations of the department. I want to get your opinion as to the advisability in some way protecting people who want to hear some other program than the one being broadcasted by chain broadcast.

"Mr. DAVIS. I may say that, of course, the department never has attempted to do anything one way or the other with regard to that situation. In other words, we have a station, WSAI, in Cincinnati. That station may choose for itself what program it wants to put on; decide for itself what program its listeners want to hear. If it

chooses to get one for itself, well and good. If it chooses to hook onto New York, well and good, so far as we are concerned, for the benefit of its listeners. That is no concern of the department. And, as you say, the interconnection between stations which makes it possible to cover the United States, or a very considerable portion of it, with one program, has grown up within the past year. It is that system which makes it possible for the President to make an address here in Washington and to be heard throughout the country as a whole. Now, obviously, each local station is authorized to use only one wave length under the present system. We assign a certain wave length and it is supposed to keep on that. If it did not we would have interference all over. So when it takes its program from New York, or wherever it may, it broadcasts it on its own wave length for that station, and the ordinary receiving set that is reasonably selective, I think, does not have very much trouble in finding some other program under present conditions. But never mind that.

"Now, it has been suggested that when there is a hook-up of that sort all of the connecting stations should be made to operate on the same wave length. That, I think, is your idea?

"Senator DILL. Well, or within a band near enough that would be practicable.

"Mr. DAVIS. That raises two questions. In the first place, the highly technical question as to whether those two stations can operate on the same wave length at the same time although they may be giving an identical program; and I believe I am safe in saying that under the present system of operation, that unless those stations are a very considerable distance apart it can not be done. In other words, you get a whistle between the two stations. In other words, that has been attempted between Boston and Springfield for some time. Those two places are only about 50 miles apart, and they have not been able to so synchronize it as to make it work to good advantage.

"In the second place, and perhaps more important, let us take WEAF, the hook-up which is the large one at present, and let us say that all of those lengths operate on the WEAF. If you will spot those wave lengths around you will find that that wave length could not be used without interference with other stations in the same city. In Philadelphia, for instance, you can not use it, without interference. There may be several other places where it can not be done. So that there are practical difficulties in the way of that situation at the present time. It may be that the art will progress where it can be done. At the present time there are practical difficulties in the way, and it can not be done. I doubt whether it could—

"Senator DILL (interposing). You would say they can not be operated on the same wave length, even if there was a band set aside for chain broadcasting?

"Mr. DAVIS. Yes, sir.

"Senator DILL. That would necessitate another band. Take 469, which is used here, there could be a band on either side of 469 on which those stations could be grouped. I recognize now the difficulties attending other stations having other wave lengths. But I come back to the proposition that I think inevitably we must enlarge the band for broadcasting.

"Mr. DAVIS. That may be, Senator.

"Senator DILL. I wonder whether it could not be that these chain broadcastings could be confined rather than playing all over the dial. I want that discussed in these hearings.

"Mr. DAVIS. Yes, and you require your stations to shift hour by hour throughout the night, which is an inconvenience, and a difficult thing. So there are practical questions that come in."

V.

Legislative History Relied Upon by the Commission

The Commission and the Government construe the legislative history of the Radio Act of 1927 and the Communications Act of 1934 with imagination. In the brief below, after discussing Congressional recognition of the benefits of chain broadcasting, the Government stated:

> "But certain dangers of the system were also noted—concentration of control of radio programs in one or a few chain managements; diminution of the station owner's responsibility for the programs of his station; duplication of chain program service by stations with overlapping service areas; and monopolization of the better radio frequencies by the chain stations."

Citation of authority for this statement was to the speech of Senator Dill, which appears at page 75 of appellants' brief. This speech has nothing to say about concentration of control of radio programs in one or a few chain managements, nor does it have anything to say about diminution of the station owner's responsibility for the programs of his station. The speech refers to monopoly only in the manner explained at pages 58-62 and 67-78 of appellants' brief.

Citation was also made to another Congressional colloquy in which Senator Dill took part. That colloquy deals with the question of the blanketing of the air by high-power stations and the consequent duplication of programs, also in the manner explained in appellants' brief. The only additional point discussed in this colloquy is the question of the equal *geographical* distribution of radio facilities.

The colloquy reads as follows:

> "Mr. DILL. This is one thing that might well be explained. The Senator is now, of course, voicing the same view that was held by the Congressman from Tennessee. The House bill provided that there should be equality of distribution of licenses between the different zones. That would mean that of the 89 wave lengths in the five zones, 17 of them should go to New England and the Atlantic

Coast; 17 to States like Ohio, Pennsylvania, Michigan, and the States in that zone; 17 to the Southern States; 17 to the Mississippi Valley States; and 17 to the Pacific Coast States. The areas and conditions for radio transmission are so vastly different in those different zones that the Senate conferees believed that that was not a fair distribution for the purpose of giving service to the people in each zone. So we wrote a provision and placed it in the bill instead of the House provision, providing that in the distribution of licenses the commission should make such distribution as would give fair, efficient, and equitable radio service to the different States and communities.

"The Senator knows that there are certain sections of the country where radio transmission of a powerful station will reach only a short distance and there are other sections of the country where the transmission will reach long distances. The value of the provision is that it enables any State or city to go into court and compel the commission by mandamus proceedings to give a license that will give them service if the commission does not do it. I think a community or State is in a far better position to get equitable service under the provisions of the bill, if the commission should fail to carry out the purposes of Congress, than it would be under an absolute distribution of 17 wave lengths to each of the five zones.

"Mr. McKellar. Would not that be tantamount to saying that it would be very much better if the whole matter were operated by one great concern in New York City? Would it not be the view of the Senator and is not the necessary result of his argument, if that be true, that it would be better for this one concern in New York to have absolute control?

"Mr. Watson. If we do not have any legislation, that is exactly what will happen.

"Mr. Dill. What is happening to-day is that the National Broadcasting Co., which is a part of the great Radio Trust, to say the least, if not a monopoly, is hook-

ing up stations in every community on their various wave lengths with high-powered stations and sending one program out, and they are forcing the little stations off the board so that the people cannot hear anything except the one program.

"There is no power to-day in the hands of the Department of Commerce to stop that practice. The radio commission will have the power to regulate and prevent it and give the independents a chance. It becomes a question of whether we would rather continue present conditions, which are getting worse and worse, without control of regulation, or whether we would rather intrust a commission, composed of men from five separate zones, to pass on these problems and decide them.

"Mr. McKELLAR. Mr. President, if the Senator will permit me, if his conference report bill actually constituted a commission that had control of the situation, there might be a great deal of force in his argument; but I wish to ask the Senator if it is not true that in all of the history of legislation, of the many commissions Congress has provided for and constituted, this is the only commission which has been established for one year and then its duties to be turned over to another officer?

"Mr. DILL. I will say that it is the only case where we have ever had divided control. I dislike very much the principle, but in order to secure legislation I agreed to it. However, I want, if I may, to clarify the situation with reference to the commission.

"The commission does not end with one year but continues, and may, and probably will, sit continuously. I wish the Senator from Tennessee would give me his attention, because he made a statement a while ago, and I should like to get this clear in his mind: We are providing in the proposed statute that the commission must sit continuously for one year, because we want to be certain that the commission itself will deal with these problems for a year and not be under the direction of the Secretary of Commerce, the President, or anybody else. We have then provided that after the expiration of the

first year the commissioners shall receive $30 a day; that all disputed matters shall be referred to them, and all decisions that are unsatisfactory to any person whose interests are affected—and that would include the owner of a radio receiving set—may be appealed to them. We have provided further that the commission may meet on the call of the chairman or a majority of the commission, and sit for such time as the commission may determine. So the talk about the commission dying at the end of the year has no justification in the language of the bill or in the practice which will undoubtedly follow.

"Mr. PITTMAN. Then why did the Senator fight for a commission?

"Mr. DILL. Because I wanted a commission to sit continuously, but in the compromise, to which I had to agree, this was the best we could get.

"Mr. PITTMAN. So the Senator has come back to the proposition that this is the best we could get?

"Mr. DILL. Absolutely; and I wish to say—

"Mr. MCKELLAR. Is not that the attitude of the Senator in relation to this entire legislation? Is it not true that the Senator does not approve of the proposed compromise but believes that the measure which he has reported out is a far better measure for the interests of the public than none at all?

"Mr. DILL. I will not say that I do not approve this compromise; I do approve it; but in approving it, I say that if I could have had my way, of course, I would have had some things in it that are not in it. If, however, I believed that this compromise bill did not protect the public interest, if I believed that the commission would not have complete control of the situation not only for the first year but continuously thereafter, I would be the first to help kill the conference report.

"I wish to state further to the Senator that I can not close my eyes to the fact that the radio industry is going to ruin so far as its usefulness to the ordinary citizen—the man with the little set— is concerned. The man with

the high-power set can secure fairly good radio service now, but the people with the little sets are almost helpless during the hours when large numbers of stations are broadcasting. I am anxious to remedy that situation.

"Mr. KING. Mr. President will the Senator yield?

"The PRESIDING OFFICER. Does the Senator from Nevada yield to the Senator from Utah?

"Mr. PITTMAN. I yield to the Senator from Utah.

"Mr. KING. I merely wish to ask a question: Does not the Department of Commerce—and that means, of course, the Secretary of Commerce—have power now to deal with the question; and if so, why does he permit this monopoly to exercise such a destructive force and crowd out and destroy the independents?

"Mr. DILL. Mr. President, the Secretary of Commerce attempted to exercise this power and did exercise it until last July. When Congress adjourned he asked the Attorney General for an opinion on the law, and the Attorney General said he did not think the Secretary had the power he was contending for under the statute of 1912. Therefore the Secretary of Commerce refused further to attempt to regulate and control the situation. He followed the advice of the Attorney General, and has issued everybody a license who has made application, and that has brought the present chaos.

"Mr. Lenroot and Mr. Bruce addressed the Chair.

"The PRESIDING OFFICER. Does the Senator from Nevada yield; and if so, to whom?

"Mr. LENROOT. I should like to ask the Senator from Washington a question in that connection.

"Mr. PITTMAN. I yield first to the Senator from Wisconsin, and then I will yield to the Senator from Maryland.

"Mr. LENROOT. Is it not true that the court in Chicago did hold that the Secretary did not have the power?

"Mr. DILL. I must say that the court in Chicago held in the case of Zenith Radio Corporation that the Secretary had no right to limit them as to wave lengths, because they had an experimental station. My personal

opinion, since this question is up here, is that if the Secretary of Commerce had tried to exercise the power as previously he could have prevented most of the confusion which has arisen, but he believed the court decision would lead to other decisions that would take away his power; and so he went to the Attorney General, and then followed the decision rendered by that official.

"Mr. BRUCE. Mr. President, will the Senator from Nevada yield to me for a moment? I should like to ask the Senator from Washington a question.

"Mr. PITTMAN. I yield.

"Mr. BRUCE: Is it not a fact that Secretary Hoover favors the bill in its present form as the best measure obtainable?

"Mr. DILL. I think Secretary Hoover favors this bill because as a number of the conferees say themselves, radio conditions are so choatic that we must have legislation, and that this is a bill which will bring order out of chaos." [68 Cong. Rec., Part 3, p. 3031; 69th Cong., 2nd Sess., 1927]

The problem of the geographical distribution of radio facilities occupied Congressional attention before and after the enactment of the Radio Act of 1927.

Section 9 of the Radio Act of 1927 contained the following provision:

"In considering applications for licenses and renewals of licenses, when and in so far as there is a demand for the same, the licensing authority shall make such a distribution of licenses, bands of frequency of wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same."

The geographical location of talent centers and sources of greatest revenue had, before 1927, caused the most pow-

erful stations to be located in and around such centers, and there was thus a concentration of radio power in the East. After the enactment of the Radio Act of 1927 the Radio Commission, pursuant to its duty to license in the public interest, convenience or necessity, took account of the practicalities of the manner in which the people of the United States could receive the best overall radio service and continued to license high-powered stations in these centers.*

The concentration of powerful stations in the East, however, gave to those Congressmen who believed that any locality was equally able to support high-power stations, both with revenue and with talent, the opportunity to raise the ever-popular cry of "monopoly." They therefore criticized the Radio Commission for its licensing policy in terms of monopoly.

In 1928 there was written into the Radio Act of 1927 an amendment which is frequently referred to as the "Davis amendment", and reads as follows:

> "It is hereby declared that the people of all the zones established by section 2 of this Act are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor; and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the States, the District of Columbia, the Territories and possessions of the United States

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* The theory of the Commission was that fair, efficient and equitable service meant the opportunity to receive programs. The theory of some Congressmen was that facilities should be geographically distributed so that the opportunity to make money from broadcasting would be distributed, without regard to the effect of such distribution of facilities upon service. *See* 69 Cong. Rec. p. 4500.

within each zone, according to population. The licensing authority shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses: *Provided*, That if and when there is a lack of applications from any zone for the proportionate share of licenses, wave lengths, time of operation, or station power to which such zone is entitled, the licensing authority may issue licenses for the balance of the proportion not applied for from any zone, to applicants from other zones for a temporary period of ninety days each, and shall specifically designate that said apportionment is only for said temporary period. Allocations shall be charged to the State, District, Territory, or possession wherein the studio of the station is located and not where the transmitter is located." [Public—No. 105—70th Cong. (S. 2317), Section 5.]

The purpose of the amendment was to make equal geographical distribution of facilities more mandatory upon the Radio Commission. It should be noted that the Davis amendment was found impractical, and was repealed in 1936, when there was substituted for the Davis amendment the following language:

"(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." [Public—No. 652—74th Cong. (S. 2243), Section 2.]

It is the legislative history of the Davis amendment that the Government cited in support of the statement that after

the enactment of the Radio Act of 1927 the merits and defects of chain broadcasting were repeatedly discussed in Congress. In so far as chain broadcasting was discussed in the debates leading to the enactment of the Davis amendment, it was discussed as the same old problem of the blanketing of the air by high-powered stations and the duplication of programs.* The development of more selective receiving sets and proper allocation on the part of the Commission, as described at page 71 of appellants' brief, had not yet occurred.

A representative portion of the debate in the House of Representatives, with reference to the distribution of facilities provided for in the Davis amendment, reads as follows:

> "[Mr. Abernethy.] Now what have we? We have the chairman of the Committee on the Merchant Marine and Fisheries fighting for this amendment. Why? Because he is a fair man and wants to keep faith with this House. He wants to keep faith with the country at large. He is not in favor of two or three big stations controlling all the power and sending out radio at $6,000 an hour for Lydia Pinkham's remedy and Pink Pills for Pale People. That is what you have now. Yes; and Wrigley's chewing gum, and Smith's cough drops, and Silver Cord tires, and occasionally David Lawrence gets on the air.
>
> "I was down in my home town the other day and my boy had bought a radio set, and I was trying to get some stations. I had heard of one that Mr. Davis had over in Tennessee, and I started at zero and went as far as the dial went, and every time I got on the dial I would hear about Lydia Pinkham's remedy and pink pills for pale people, and I never did get Judge Davis's station, and I do not really believe he has one at Nashville. [Laughter.]
>
> "Mr. Celler. Does the gentleman think that the radio station can be kept going without this advertising?

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* For example, Senator Dill discusses the practicability of broadcasting chain programs on one wave length, 69 Cong. Rec. pp. 5157-8, 5290. See also, in addition to the pages cited by the Government, 69 Cong. Rec. pp. 4488, 4489, 4493, 4497, 4498, 4499, 4500, 4568, 5160, 5293, 5157, 5158.

"Mr. Abernethy. I will say to the gentleman that the Governor of North Carolina asked the Members of the House from North Carolina to vote down the amendments offered by the gentlemen from Oklahoma [Mr. McKeown] and the gentleman from Tennessee [Mr. Davis] on the assurance that North Carolina would get consideration. We have one little station in the city of Raleigh that has 500 watts, and we have been promised 500 more, with the suggestion that probably the time might be divided. I think that if Judge Sykes has the power given to him he is going to make a fight for us; but the trouble is he can not make it if you do not give him the power. Just write this Davis amendment in here and divide this power equally between the five zones.

"Take the great western country. The fifth zone has only 61,785 watts, while one station alone in New York has 50,000 watts. That is the situation with reference to the whole western coast, and I am talking to you men from that western country. Now listen, Zone 4 has 164,870 watts while the State of New York alone has 162,500 watts. The southern zone, the third zone, has 47,000 watts, and second zone has 106,000 watts.

"Now, gentlemen, nobody wants to cut down the power. Nobody wants to destroy these big stations; nobody wants to take away from the people their right to hear jazz, but we want this commission to understand that as far as the balance of the country is concerned that it has a direct mandate from Congress that when we write a radio law that there shall be an equal distribution throughout the country that they should meet that, and not come here and say they can not do it, and they should not fill the papers full of aspersions against Congress, as some of them have done, and I do not refer to Judge Sykes, either. [Applause.]" (69th Cong. Rec., Pt. 4, p. 4498).

Senator Dill accurately stated, however, that the Davis amendment had nothing to do with chain broadcasting. See

the following colloquies which took place upon the floor of the Senate:

"Mr. Barkley: Let me ask the Senator another question. We have all received many protests from people in our States and all over the country with reference to the activities or lack of activities of the Radio Commission with respect to chain broadcasting stations, and monopolies, and all that. To what extent does this proposed legislation cure that situation?

"Mr. Dill: This proposed legislation does not attempt to control chain broadcasting. The commission already has power to control chain broadcasting. Nor does it attempt to meet the so-called monopoly complaints as such. If the Senator will bring that up a little later when I discuss the chain system, I will be glad to answer him further" (69 Cong. Rec., Pt. 5, p. 5156).

* * * * * * *

"Mr. Watson: There seems to be what I regard as a mistaken impression, that is, that very high-powered stations are essential to chain broadcasting. I wish the Senator would explain that that is not true.

"Mr. Dill: I may say that the high-powered station has nothing whatever to do with the broadcasting by the chain system, that the wires simply carry the program to the station, and one station may broadcast at 500 and one at 5,000 and one at 10,000. Each is individual in its own field. The power of the originating station has nothing to do with it.

"Mr. Smith: Mr. President, will the Senator yield?

"Mr. Dill: I yield.

"Mr. Smith: Is there any provision in the bill under which the American public can get now and then a space during the evening performance to hear something sensible, rather than be drowned out with jazz?

"Mr. Dill: I must say to the Senator that we have not written in the bill any direction to the commission as to allowing only jazz programs or only some other kind of programs. In other words, that would mean giving the

commission the power of censorship, and that is not desirable'' (69 Cong. Rec., Pt. 5, p. 5160).

It should, therefore, be recognized that the legislative history of the Davis amendment cited by the Commission and the government has nothing to do with the ''merits and defects of chain broadcasting'' as an anti-trust matter. Although there was further discussion of chain broadcasting in 1928 as a problem of blanketing and duplication, Congressional discussion of monopoly did not relate to those aspects of chain broadcasting denominated ''restraints on competition'' by the Commission in the instant proceeding.

Legislative history cited by the Government as to what took place in 1937 does not affect the analysis made here and made in appellants' brief, nor can Congressional action occurring three years after the passage of the Communications Act of 1934 affect its interpretation.

APPENDIX E.

Excerpts from Proceedings in Docket No. 5060

Order No. 37 authorized the Commission to hold hearings in connection with its investigation. On April 6, 1938, the Commission authorized a committee composed of Commissioners Sykes, Brown, Walker and Chairman McNinch to supervise and direct the investigation under Order No. 37 and to hold hearings in connection therewith. Hearings were commenced on November 14, 1938.

Subjects Covered

The hearings were opened by a statement by Chairman McNinch who read from a preliminary letter to all networks and stations specifying twenty aspects of broadcasting upon which all national and regional networks would be called upon to present evidence:

"In connection with the first phase of the testimony, Network Operations, all national and regional network will be called upon to present evidence dealing with their operations, specifically as to:

"1. Corporate and financial history of network organizations including detailed information on both direct and indirect ownership or control thereof;

"2. Nature and character of activities engaged in by network from the date of its organization;

"3. Name, number and location of all stations now or previously licensed to or affiliated in any manner with network with particular reference to the reasons for entering into or terminating any such affiliation and the basis upon which additional affiliations are entered into;

"4. Nature of contracts, agreements or other arrangements between network and affiliates including reasons for various provisions of such contracts, agreements, or other arrangements, and history of the same;

"5. Classification and grouping of stations connected with network as basic supplemental, and so forth, with reasons for the same;

"6. Financial arrangements between stations and affiliates, including basis for charges made by networks and affiliates;

"7. The history and development of the network program policy, particularly with reference to standards which programs must meet, diversification, accommodation of program characteristics to the requirements of the area served, and program and advertising continuity;

"8. Extent to which affiliates are required to conform to network program policy and extent to which affiliates control or influence policy;

"9. History and development of operating policy and procedure with particular reference to contracts and agreements with wire companies for program transmission;

"10. History and development of policy with respect to sale of time for advertising or other purposes, particularly with respect to standards applicable to products or services for which advertising is accepted;

"11. Detailed information as to the hours which network controls over affiliated stations, the number of such hours actually used for network, commercial purposes over affiliated stations and the number of hours of network sustaining programs actually used by affiliates;

"12. Rights of network and affiliates in event affiliate desires to substitute a local program for a network program;

"13. History and development of agreements, contracts, or other arrangements between networks and advertisers, or other program sponsors, particularly and in detail agreements, contracts, or other arrangements with persons or organizations acting as agencies for the

placing of broadcast advertising or the sale of time over the network;

"14. History and development of policies with reference to the development of program talent and facilities of network organization devoted to that purpose;

"15. Explanation and details of the organization, function, policies and practices of any agency directly or indirectly controlled by the network organization which retains and procures talent for the purpose of selling such talent to the sponsors of commercial radio programs;

"16. The nature of the service rendered by each station licensed to the network, particularly with respect to the amount of program origination for network purposes at such stations and with respect to the nature of the local service rendered by such stations;

"17. Name of any national advertising agency, user, or national representative of a station whose officers, directors, stockholders or proprietors hold any securities of the network organization, and the exact extent of such holdings;

"18. Name of any national advertising agency, user, or national representative of a station, the securities of which are held by the network, its officers, directors, or proprietors;

"19. Any relationship that may exist between the network and any national advertising agency, user, or national representative of a station through officers, directors, proprietors, employees, or security holders in common, and the exact nature and extent of such relationship;

"20. Extent of program duplication in the primary and secondary service areas of stations carrying the network programs, particularly the percentage of population in the primary service area of each network station which may receive a network program as primary service from such station and from other network stations, the

percentage of secondary service area of each network station which receives a network program as secondary service from such station and from other network stations, the number and extent of such duplications and amount of duplication required for adequate service in chain programs. The primary and secondary service areas shall be considered as defined in the Commission's proposed Rules and Regulations governing standard broadcast stations and Standards of Good Engineering Practices concerning the same." (Tr., pp. 9-12.)

Procedure; Purpose

Thereafter, Chairman McNinch had the following to say with reference to the procedure to be followed and the purposes of the investigation:

"In order to expedite the hearing as much as possible the networks, the transcription companies and those persons and organizations who have filed notices of appearances will be permitted to be represented by counsel in presenting direct testimony. *Cross-examination of witnesses generally will be by the Committee and by its staff.* Parties desiring to ask questions should, if at all possible, hand the Commission's counsel such questions in writing. Departure from this procedure will be allowed only where the Committee shall decide that the ends of justice will be served thereby, upon request pointing out the interest of the party desiring cross-examination and the purpose and scope thereof. The Commission shall be furnished with fourteen copies of each exhibit offered in evidence (Tr., p. 13).

. . . . . .

"The purpose and object of this investigation is to develop facts for the information of the Commission and public concerning the matters included in Order No. 37. On the basis of the facts developed in the course of the investigation, *appropriate rules and regulations dealing with such matters will be promulgated by the Commission, and if such facts demonstrate the necessity therefor,*

legislative recommendations made to the Congress by the Commission.

"The Committee will not permit this hearing to be used as a sounding board for any person or organization. We are after facts and intend to get them. Only relevant opinions of those qualified to speak may be admitted for whatever light they may throw upon the problems involved in this investigation. I have emphasized that paragraph in order that none may miss it or misunderstand its purport or the intention of the Committee, that this is a factual inquiry and it will be held to that, plus the expression of expert opinion that is relevant to matters at issue" (Tr., pp. 13-14). (Emphasis added.)

It appears that the Commission conducted a broad investigation into practically all aspects of radio broadcasting. The object of the investigation was to inform the Commission not only with respect to what rules and regulations it might make but also to inform the Commission with respect to what recommendations it might make to Congress. NBC and others requested by the Commission to furnish information cooperated fully and responded broadly to the expressed desires of the Commission. In addition to requesting various national networks, regional networks, station licensees and transcription and recording companies to present evidence, the Commission requested information by questionnaire from licensees of stations and from holders of stock in licensee corporations.

During the course of the hearing it appeared that Commission counsel conceived of the hearing as one to which there were no parties:

"Mr. Hennessey: If the Commission please, before Mr. Dempsey resumes his examination of Mr. Tuthill, I would like to request that when he asks questions suggested to him by counsel for other parties in this proceeding or questions which are not his own that the source of those questions be indicated as they are asked. That has been the procedure heretofore.

"Mr. Dempsey: *Mr. Chairman, in the first place, I would like to point out that there are no parties to this proceeding at all.* Almost all of the questions that I have asked have been based on information obtained in one place or another. We have had to make inquiries of considerable scope from a number of people to phrase any of these questions." (Tr., pp. 284-285.) (Emphasis added.)

Commissioner Brown stated that the proceeding was not an adversary one:

"Commissioner Brown: *This is not an adversary proceeding. It is a proceeding to obtain facts.* It is the view of the Commission that wherever facts pertinent to the issues as outlined should be submitted, that they may be submitted. When questions are asked, of course, counsel has the right to object to the question." (Tr., p. 287.) (Emphasis added.)

Commissioner Walker stated that the proceeding was one which would not be appealed anywhere:

"Commissioner Walker: The motion is overruled.

"*Just as an observation, this not being a case that will be appealed anywhere, I assume that counsel do not care to note exceptions on the record, but if they do care to do so, they may.*" (Tr., pp. 7190-7191.) (Emphasis added.)

The last person to testify before the Commission did so on May 19, 1939. Thereafter, various persons associated with the Commission requested additional matter from NBC, which was supplied.

Digest and Analysis; Sources of Information

The General Counsel for the Commission directed the staff of the Commission to make its "Digest and Analysis of Evidence Presented in the Hearing on Commission Or-

der No. 37 (Docket 5060) and *of the Files of the Commission.*" At page 2 of that Digest it is stated:

"The record in this hearing is composed of 8,713 pages of testimony and 674 exhibits; there were 94 witnesses heard and the hearing consumed 73 days, extending over a period of six months.

"*This report is based upon evidence from these sources and also from information otherwise in the records of the Commission.*" (Emphasis added.)

Committee Report of June 12, 1940

After the Digest was made and on June 12, 1940, there was issued the report of the committee appointed by the Commission to supervise the investigation, which was signed by Commissioners Brown, Walker and Thompson. The memorandum of submittal to the Federal Communications Commission reads in part as follows:

"This report deals with the following subjects: The Predominance of Network Organizations in the Radiobroadcast Field; Contractual Relation of Network Organizations to Station Licensees; Radiobroadcasting and the Supply of Talent; Transcription Services in the Radiobroadcast Industry; and Multiple Ownership of Radiobroadcast Stations. There is attached to the report, as Appendix A, an exhaustive and detailed digest of the evidence received by this Committee during the extensive hearings held by it as well as of other related material in the official files of the Commission. There is also attached, as Appendix B, a report compiled by the Law Department entitled 'Report of Persons and Other Entities Holding Stock Interest In, Control Over, or Official Relationship to More Than One Standard Broadcast Station Reported to the Federal Communications Commission to April 1, 1940.'

"*The Committee is of the opinion that these materials form an adequate basis upon which the Commission may proceed to a consideration of the need for a revision of*

its licensing policy in the radiobroadcast field in order to correct the serious inequities and arbitrary practices which have developed in connection with chain broadcasting" (p. i.) (Emphasis added:)

Oral Argument; Jurisdiction; Power to Deal with Contracts

After the issuance of this report and on November 28, 1940, the Commission announced its procedure for oral argument on that report, which was held on December 2 and 3, 1940. This procedure is found in Appendix C to the Report on Chain Broadcasting and sets forth twelve draft regulations relating to chain broadcasting. It should be noticed that there were only five days between the issuance of the procedure for oral argument and the oral argument itself. Upon the oral argument counsel for NBC took the position that the regulations embodied in the procedure for the oral argument were beyond the jurisdiction of the Commission.

The oral argument was held before Commission Chairman Fly and Commissioners Thompson, Walker, Case, Craven and Payne.

In an opening statement, Telford Taylor, general counsel to the Federal Communications Commission, stated:

"From the very outset it was recognized, and it was so stated by Chairman McNinch, at the opening of the hearings, that the facts elicited might lead to regulations which the Commission presently has power to promulgate, *and that also the facts might show the necessity for recommendations to Congress with respect to matters outside the Commission's jurisdiction under existing law"* (Tr., pp. 8719-20).

* * * * * *

"The National's brief criticizes the report for—as they put it—'discarding Chairman McNinch's suggestion to which I have already referred, made at the outset of the hearings, that it might be necessary to seek additional

legislation. Now, with all respect, I can find no basis for such a construction of the Report. The Report is silent on the question of existing authority to deal with such matters as talents supply and transcription. Chairman McNinch's suggestion that it might be necessary to seek additional legislation was not discarded. The Committee's letter transmitting its Report to the Commission expressly recognizes that further legislation may be necessary.

"Now, in one particular field the Committee did express an opinion on the Commission's power under existing law. It stated a believe (*sic*) that the Commission presently has authority to pass regulations governing contracts between networks and their affiliates. * * * The Law Department of the Commission believes that this body does have such authority and we are prepared to present and will present argument on that question. But, in any event, as is pointed out in the brief filed for the Independent Radio Network Affiliates, Incorporated, the answer to that question is not, at this stage of the proceeding, a matter of first importance. *Since this inquiry has not been limited to the existing powers of the Commission but includes the possibility of legislative recommendations the point to be first resolved is the question of what regulations are desirable*" (Tr., pp. 8729-30). (Emphasis added.)

In a further opening statement, Joseph Rauh, Assistant General Counsel, in discussing the jurisdiction of the Commission to promulgate its proposed regulations, stated:

"*Therefore, if such conclusions can be drawn from the record and in view of the fact that this a legislative proceeding (sic), from any other source* there would seem to be clear jurisdiction based on the very simple proposition that the Commission has power to deal with contractual relationships entered into by radio stations which affect their ability to operate in the public interest" (Tr., p. 8735). (Emphasis added.)

Further Information

Thereafter, various persons associated with the Commission requested further material from NBC. For example, on December 20, 1940, the Secretary of the Commission requested information of NBC concerning changes in its Program Department, Artists Bureau and the relationship between the Red and Blue networks, and on April 11 he requested of NBC certain additional information with respect to taxes.

Report of May 2, 1941

On May 2, 1941, the Commission issued its Report on Chain Broadcasting together with its original Order. At page 3 of the Report is found the following statement:

> "The views expressed and the regulations adopted herein are, we believe, fully supported by the evidence adduced at the hearings by the networks and other interested parties. With respect to such matters as the present allocation and ownership of particular broadcasting facilities, we have utilized our current official records. The historical data in the early chapters includes matters of common knowledge or of public record. In a proceeding of this character, there is no reason to exclude such matters of record from consideration."

The Report was signed by Commission Chairman Fly, Commissioners Walker, Payne, Thompson and Wakefield. Commissioners Case and Craven dissented.

White Resolution; Conferences; Amendment

From June 2 to 20, 1941, extensive hearings were held before the Senate Committee on Interstate Commerce on the White resolution which called for a study of the Commission's chain broadcasting regulations.

During July and August, following these hearings, a series of conferences was held between the industry and the Commission with reference to regulations.

On September 12, 1941, there was argued a petition of the Mutual Broadcasting Company requesting certain amendments in the regulations. And on October 11, 1941, the Commission issued its Supplemental Report on Chain Broadcasting, together with its Order amending the original Order. That Report contains the following statement:

> "After a careful study of the testimony presented before the Senate Committee on Interstate Commerce, *of the considerations presented at the conferences which followed the hearings*, and of the oral arguments presented at the hearing on Mutual's petition and of the briefs filed at that time, and after a thorough reconsideration of the entire subject, the Commission has decided to amend three of the Chain Broadcasting Regulations • • •." (Emphasis added.)

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Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY

DAVID M. WOOD,
Solicitor for Woodmen of the World Life Insurance Society

Of Counsel:
JOHN B. DAWSON

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the Commission, or otherwise the inevitable result will be the indirect control by the Commission of any number of indefinable matters over which Congress or no one else would want the Commission to have control. Moreover any attempt of the Commission to expand its powers beyond those specifically enumerated in the act violates the First Amendment, and Article I, Section 1, of the Constitution of the United States.

POINT IV.

CONCLUSION.

Appellant submits that the Order in question is beyond the authority of the Commission and arbitrary and capricious. The District Court erred in dismissing the complaint without a trial upon the arbitrary and capricious character of the Order.

Respectfully submitted,

DAVID M. WOOD,

Solicitor for Woodmen of the World Life Insurance Society

Of Counsel,

JOHN B. DAWSON

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BRIEF FOR APPELLANT WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY

Appellant Woodmen of the World Life Insurance Society, co-appellant in case No. 554, joined as a party plaintiff in the suit brought by National Broadcasting Company, Inc. (hereinafter called NBC) because of the legal question

at the outset as to whether NBC had standing to sue on its own behalf, inasmuch as the Order complained of was, by its terms, directed against the licensing of the individual stations comprising the NBC network rather than against NBC itself. It was recognized by the independent stations affiliated with NBC that the validity of the Order could best be tested through the organization and facilities of NBC, and that an action by NBC would, to all intents and purposes, be in the nature of a class suit. This appellant joined in the suit in order to protect its license as an operator of an independent standard broadcast station, in the event the Court might hold that NBC was without standing to sue.

Although the question of the standing of NBC to bring this suit has been obviated by the decision in this Court rendered June 1, 1942, with respect to the jurisdiction of the District Court, this appellant nevertheless wishes to state its position on the validity of the Order complained of, which position this appellant believes is representative of the position of other operators of independent radio stations affiliated with NBC.

The brief for appellant NBC filed concurrently herewith adequately sets forth the manner in which this appeal is before this Court, the facts with respect to network broadcasting, the power asserted by the Commission, the nature of the Order involved, and the errors of the Court below. These matters will not be repeated in this brief.

It is also not the purpose of this brief to repeat the legal arguments contained in the brief of appellant NBC, but said brief has been read and is fully concurred in by appellant Woodmen of the World Life Insurance Society.

The argument upon the law and facts contained in said brief is adopted *in toto* by this appellant as its argument, and the only addition thereto herein will be to present the views of this appellant on the facts peculiarly pertinent to this appellant, and to point out the irreparable damage which will occur to this appellant if the Order complained of is permitted to stand.

Statement

The appellant Woodmen of the World Life Insurance Society is a fraternal benefit corporation organized and existing under the laws of the State of Nebraska and having its principal office in the City of Omaha in said State. It owns and has continuously operated a standard broadcasting station known as WOW located in the City of Omaha, Nebraska, since April 2, 1923 under licenses issued by the Federal Radio Commission and its successor, the defendant Federal Communications Commission. These licenses were issued upon findings as required by the statute that the public interest, convenience and necessity would be served thereby, and this appellant is now, and at all times since 1923 has been, duly qualified legally, financially, technically and by experience, and in all other respects, to operate said station WOW. Station WOW is now and has been since 1927 an affiliate of the NBC network. Its present contract of affiliation is similar to the contract which is in evidence here (R. 255).

In addition to broadcasting network programs transmitted by NBC over its network, appellant's station WOW broadcasts many programs which it originates itself. Ap-

proximately half of the broadcasts of station WOW are network programs, and the revenue derived by this appellant from the broadcasting of network programs has consistently amounted for several years to sums in excess of $100,000 per annum (R. 256).

This appellant's radio station WOW during its approximately twenty years of operation has, by the superiority of the programs broadcast by it, acquired great popularity with the millions of the radio audience in the territory adjacent to the City of Omaha, Nebraska, and in the several States covered by its broadcasting facilities. The size of this listening audience and the popularity of the station and, consequently, its ability to produce income and revenues from the sale of time for advertising, is due in large measure to the high quality of the sustaining and commercial programs received by station WOW from NBC through its network (R. 256, 257). Without the aid of the organization and facilities of NBC in furnishing high quality sustaining and commercial programs this appellant would be required to incur great additional expense in personnel, equipment and facilities to provide programs of the same high quality and standard as those furnished by NBC (R. 257). This potential threat to the revenue producing ability of station WOW imperils this appellant's investment in said station of assets, other than good will, having a present value in excess of $175,000, and values in good will and as a going concern created during its approximately twenty years of operation in excess of $500,000. (R. 258, 256).

Argument

POINT I.

THE ORDER COMPLAINED OF WILL CAUSE IRREPARABLE DAMAGE TO APPELLANT, WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, AND BEARS NO REASONABLE RELATION TO THE STANDARDS AND OBJECTIVES OF THE COMMUNICATIONS ACT OF 1934, AND IS ARBITRARY AND CAPRICIOUS.

The order complained of is obviously directed at certain business practices of the NBC network, and the major controversy in this case is between the two agencies most influential in the radio broadcasting industry, the networks and the Federal Communications Commission. NBC contends that the business practices adversely affected by the order are beneficial to the radio advertising industry, productive of both commercial and sustaining radio programs of high quality, and essential to the continuation of the existence of national networks, and the Federal Communications Commission takes the view that such practices are inimical to the public good. In between these parties stand the independent operators of standard radio broadcasting stations such as the appellant Woodmen of the World Life Insurance Society, and it is the main purpose of this brief to call to the attention of the Court with as much force as possible the attitude of these stations to the controversy in this case.

The interests of the independent operators of standard radio broadcasting stations are directly affected by the

order, for it is through the medium of the licensing of these individual stations that the Commission has attempted to strike at the networks. The order complained of, broadly speaking, prohibits the licensing of such stations having affiliation contracts with networks in the form set forth in the order.

BENEFITS TO PUBLIC AND STATION UNDER AFFILIATION CONTRACT

At the outset this appellant desires to inform the Court that it feels that it is under no disability by reason of its affiliation contract with NBC. It has had such a contract continuously since 1927 (R. 256). On the contrary it has considered that the benefits flowing to the station from the affiliation far outweigh any disadvantages that might have obtained under the contract, as evidenced by the continuity of the relationship extending over a period of approximately sixteen years. This appellant could have terminated the affiliation if it had desired to do so. There is no question but that the contract has been an asset of proven value to this appellant.

The advantages are twofold. First, appellant's station has been receiving from NBC and broadcasting for many years the finest type of commercial programs, and has received consistently for several years as revenue from the broadcasting of such commercial programs from the NBC network sums in excess of $100,000 per annum. Second, appellant's station has had access to and has broadcast without cost to its station sustaining programs transmitted by NBC over its network of a quality which appellant, in its individual capacity, would be unable to match without

great additional expense, and, as to some sustaining programs, which appellant could not be able to equal at any expense.

As a result of the services rendered to appellant's station by NBC under its affiliation contract, station WOW has, by the superiority of the programs broadcast by it, acquired great popularity with the radio audience in the area covered by its facilities, and it has been a financially successful operation for appellant. The popularity of the station is the best evidence of the satisfaction of the listening public to the type of programs submitted through the NBC network, and is undeniable proof that the listening public is contented with the material it receives through the facilities of station WOW. Appellant has further profited from the popularity of its station with the listening public by obtaining from time to time increases in business from the network, and by demand for radio time over its station for local commercial enterprises and national spot programs which are sold direct to advertising customers without the medium of the network.

Appellant feels that it is in close contact with its listening audience. It receives daily hundreds of communications from its listeners commenting upon programs broadcast by its station and has used various service agencies to sound out and determine the type of programs preferred by its listeners. Every effort has been made to conform its programs to the desires of its listeners, as the popularity of the station measures its power to earn revenues from its commercial advertising. The efforts on the part of appellant to please its listening audience have in nowise been detrimentally affected by its affiliation contract with NBC.

To sum up the effect the affiliation contract with NBC has had upon the operations of appellant's station in the past, appellant states that the popularity of the station attests the satisfaction of the public with the quality of the sustaining and commercial programs broadcast by it, and further that the operation has been a successful and profitable business venture for it.

EFFECT OF ORDER ON FUTURE STATION OPERATIONS AND ON PUBLIC

If the order complained of is permitted to stand, the ability of NBC to produce the same high quality commercial programs will be seriously impaired, as is so ably argued in the brief of appellant NBC. The impairment of the network's ability in the commercial end of the business will naturally affect its ability to produce and supply sustaining programs of a quality comparable to those produced in the past. It will, therefore, devolve upon the individual standard radio broadcasting stations to provide to a much greater extent their own commercial and sustaining programs. Each individual station will be required to provide its own personnel, equipment and facilities equal to those which are now available to it through the organization and facilities of NBC. Obviously the expense of the individual stations will be increased many fold. Certain high quality sustaining programs now produced by NBC at tremendous expense, such as the NBC symphony orchestra, will not be available to the individual stations, and some of them would not be available at any cost. For instance, there is only one Toscanini, or Lily Pons, or

Lawrence Tibbett, or many other artists that NBC has made available to network stations on sustaining programs in the past. The services of these artists are beyond the means of individual stations; their services would be acquired exclusively by larger stations whose income would be ample to obtain their services, and many millions of radio listeners would be deprived of the pleasure of listening to the performances of such artists. Events of national importance of interest to radio listeners everywhere are occurring today in every part of the United States and of the world, and the expense of obtaining on-the-spot descriptions and broadcasts of such events would be prohibitive to individual stations.

In addition to the difficulties outlined above in obtaining sustaining and national interest programs of high quality, the ability of standard radio broadcasting stations to contract for national commercial advertising programs would require a tremendous increase in the expense of operating such stations. Under present operations, the facilities and the highly trained organizations of the networks are competing for this type of business on behalf of not only the networks, but of various independent stations affiliated with them. This does not mean that the competition for such advertising is not keen, but the expense of providing an organization to compete for such contracts is distributed equitably among the networks and their affiliates, so that each station is not required to maintain a large organization and representatives in various centers of population throughout the country, where most national radio advertising contracts are let in order for such individual stations to obtain participation therein. The advantages accruing

to the networks and to the national advertisers are fully presented in the brief of appellant NBC but when the effects of disintegration of the business organization of the networks there noted are applied to the individual stations, the result is magnified many times. Most individual stations would not be financially able to obtain contracts in any way near the volume now available to them, and the resulting loss in revenues would be substantial. There is at present no method of replacing such lost revenues, to the irreparable damage of such stations. This appellant submits that it will likewise suffer irreparable damage if it is deprived of the facilities and organization for obtaining national programs now available to it through the NBC network.

If the order complained of is permitted to stand, and, as this appellant believes and asserts, the foregoing conditions will result, the enjoyment and education of the radio audience and the programs available to them will be materially lessened and the earning capacity of the individual stations will be seriously and irreparably impaired. The values, both physical and in good will, built into appellant's station through its twenty years of operation will be materially reduced, and this appellant will suffer a loss in the destruction of such value. However, the public will be the real losers by the lowering of the quality of the programs available to them.

POINT II.

APPELLANT WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY AND OTHER OPERATORS OF INDEPENDENT STANDARD RADIO BROADCASTING STATIONS WERE NOT MADE AWARE OF THE PURPOSE OF THE COMMISSION'S HEARINGS ON CHAIN BROADCASTING.

When the Commission instituted hearings on chain broadcasting in 1938 appellant assumed that the hearings would follow the usual pattern of such hearings and concern only the technical side of chain broadcasting, and a determination as to whether the public interest, convenience or necessity was being served by network broadcasting. Appellant, like other individual operators of standard broadcasting stations, is not equipped to follow in detail protracted hearings by the Commission, and the order complained of in this proceeding came as a considerable surprise to the appellant, and it must have come as a considerable surprise to many other operators of individual stations.

The report on chain broadcasting of the Commission deals almost solely with the creation of the various networks and the operation and business relationships of the networks with commercial advertisers, with particular emphasis on the competition of the networks for station affiliation. It ignores completely the desires of the operators of independent standard radio broadcasting stations and the listening public. It also ignores the desires of the sponsors of the commercial programs which make the broadcasting

industry a profitable business enterprise. Stripped of all legal formalities and camouflage, the practical effect of the order of the Commission is to attempt to assist the Mutual Broadcasting System to obtain a wider coverage for its advertising customers than it has at the present time, at the expense of the older networks.

Those in the radio broadcasting industry know that the competition between the networks for radio advertising business is keen, and that the competition for the local radio audiences and local radio advertising business between independent standard radio broadcasting stations is equally keen. To keep and build station popularity with their own radio audiences, local stations have in the past, and will in the future, affiliate with the networks offering consistently the best facilities, organizations and programs. In its own sphere in the industry, appellant is surrounded by competitive stations, and if appellant had felt that its radio audience and its own best interests would have been benefited by severing its affiliation with the NBC network and operating independently of any network or joining a competitive network, it has had many opportunities to move either way. It is this competition between the networks for the national radio advertising business, and the competition between the networks and individual stations for station audiences, that has built and maintained the present high quality sustaining and commercial programs. Appellant NBC contends that it cannot satisfactorily operate without option time. This will mean that the burden and expense to the local independent stations of supplying satisfactory sustaining and commercial programs will be greatly increased.

POINT III.

APPELLANT WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY CONCURS IN THE ARGUMENTS SET FORTH IN THE BRIEF OF APPELLANT NATIONAL BROADCASTING COMPANY, INC.

Appellant submits that the Commission has overstepped the limits of the jurisdiction conferred upon it by Congress, and that it is of vital importance to the public and to the owners of independent standard broadcasting stations that the Order complained of be set aside. The very form of the Order complained of, directed as it is against the licensing of individual stations, though intended as a blow at the national networks, is proof of the circumventing of the limits imposed by Congress, to strike at business organizations and practices over which Congress never intended the Commission should have control. If Congress had intended to authorize the Commission to regulate such business organizations and practices, it would have included express language in the Communications Act of 1934, effecting that intention, for all the practices now complained of by the Commission were in effect when that act was passed. In prohibiting the operation of a radio broadcasting station without a license from the Commission, Congress gave to the Commission the power of life and death over every broadcasting station in the country. This broad power must, therefore, be limited to the purposes for which it was granted by Congress, and every attempt to exercise that power must be construed strictly against

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Intervenor.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY

E. WILLOUGHBY MIDDLETON,
Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

Of Counsel:
THOMAS H. MIDDLETON.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY

Statement

This is a suit for an injunction whereby appellant Stromberg-Carlson Telephone Manufacturing Company, Woodmen of the World Life Insurance Society, and National Broadcasting Company, Inc. (hereinafter referred to as

NBC) seek to enjoin the Federal Communications Commission from enforcing an order of the Commission on the ground that the Commission lacks power to make the order and that the order is arbitrary and capricious. Appellants Stromberg-Carlson Telephone Manufacturing Company and Woodmen of the World Life Insurance Society are each licensed operators of single radio broadcasting stations affiliated with the nationwide network of NBC. The order complained of purports to regulate the contractual arrangements existing between the NBC network organization and the individual broadcasting stations affiliated with said network, including appellants Stromberg-Carlson Telephone Manufacturing Company and Woodmen of the World Life Insurance Society.

The brief for appellant NBC contains a statement fully setting forth the facts in this case, and is incorporated herein by reference, in order to avoid unnecessary repetition. This appellant, however, desires to call the Court's attention to certain facts relating primarily to this appellant.

This brief is not intended to cover argument on the legal issues involved in these proceedings, such arguments having been fully and ably presented in the brief filed on behalf of NBC, and this appellant hereby adopts such arguments as its own, in order to avoid needless repetition. This brief is intended rather to present to this Court the very difficult position in which this appellant finds itself as a result of the order promulgated by the Commission in regard to network affiliation contracts.

Stromberg-Carlson Telephone Manufacturing Company (hereinafter referred to as Stromberg-Carlson) is a corporation organized and existing under the laws of the State of New York, having its principal place of business in the City of Rochester, New York. It is the owner and operator of the 50,000 watt standard broadcasting station WHAM located at Rochester. It has been licensed to operate and

has in fact operated that station since 1927, having acquired it by purchase from the prior owner and operator.

The Federal Radio Commission, since 1927, and the Federal Communications Commission, since 1934, have granted to Stromberg-Carlson successive renewals of its license to operate this station and successive increases in power, upon appropriate findings that the public interest, convenience and necessity would thereby be served.

WHAM is an absolutely independent station, being owned and controlled exclusively by this appellant. Since 1927, it has been affiliated with NBC in nationwide network broadcasting.

Argument

When the hearings involved in these proceedings were first instituted before the Commission in 1938, pursuant to Order No. 37, Docket No. 5060, it is true that all the independent broadcasting stations of this country—about 900 in number—were notified that the hearings were to begin and were offered an opportunity to present testimony. However, these notices gave no intimation whatever that the Commission proposed to take any action to nullify network affiliation contracts. Stromberg-Carlson assumed that these hearings, and any orders, rules or regulations which might result therefrom, would be limited to technical matters of broadcasting. It had no idea that its network affiliation contract would be affected by these hearings, and accordingly took no part in them. It presented no testimony, and was not even represented at a single hearing.

These affiliation contracts have been entered into in good faith, and have been performed in good faith for a period of more than fifteen years. We honestly maintain that they are perfectly valid. Certainly they have never been adjudicated to be invalid. And yet the Commission, by a

mere order, has presented to Stromberg-Carlson the alternative of giving up either its broadcast license or its affiliation contract, each of which constitutes a *sine qua non* of effective broadcasting. We respectfully submit that Stromberg-Carlson has not had its day in court on the question of the validity of these contracts.

The statutory court, in its opinion (R. 522, 529), seems to assume that the affiliated stations would prefer to be more free of the networks than they are. Certainly Stromberg-Carlson does not agree with this assumption. Its position is that the terms of these affiliation contracts grant to the affiliated stations as much freedom as is consistent with the practical necessities of efficient network broadcasting. As to the provisions for option time, Stromberg-Carlson heartily endorses the sentiments expressed by the dissenting Commissioners to the effect that

> "* * * without them the situation would be analogous to a railroad in which each station-master along a *through route* had adequate power to make his own train schedules for through trains". (Report, R. 159)

In other words, without the option time clause national networks would be unable to schedule programs for national advertisers, who supply the money for the networks and the stations. Stromberg-Carlson remembers only too well the chaotic condition which existed in the early 1930s, before it had such an agreed provision with its network. Its position in this case was stated in a preliminary way by the affidavit of Mr. Hanover, Vice-President of Stromberg-Carlson, in support of the application for a temporary injunction (R. 259-62). This affidavit points out the chief terms of this extremely valuable contract. Stromberg-Carlson desires to continue its option granted to the network for the limited number of hours during each day, because that arrangement represents a nice balance between the necessities of a national network and the ability of WHAM to supply local needs

Stromberg-Carlson also views with apprehension the possibility in the future of being unable to receive from the network, free of charge, the magnificent sustaining programs supplied in the past. This is because the fine network programs, both sustaining and commercial, have built up WHAM's listening audience, thereby making it a more valuable outlet for the sale of its own time locally. Like its competitors, the newspapers and magazines, it must depend on the size of its circulation—its listening audience.

It is Stromberg-Carlson's contention that its affiliation contract is a valid contract governing business practices, that this contract does not violate the Anti-Trust Laws, and that if there be any question in this regard, such illegality can be established only by the final judgment of a court having jurisdiction, in a proceeding to which Stromberg-Carlson is a party. We agree with the contentions and legal arguments advanced by the networks that the Commission did not have the power to regulate business practices, and accordingly that the order of the Commission purporting to do so is invalid.

Conclusion

For the foregoing reasons, it is respectfully submitted that the decision of the District Court dismissing appellants' complaint on the merits should be reversed and the cause remanded to that Court for the issuance of a permanent injunction against the enforcement of the Commission's order which is the subject of these proceedings.

Respectfully submitted,

E. Willoughby Middleton,
Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

Of Counsel:
THOMAS H. MIDDLETON

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 554.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANT NATIONAL BROADCASTING COMPANY, INC.

JOHN T. CAHILL,
Solicitor for National Broadcasting Company, Inc.

Of Counsel:
JAMES D. WISE
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Pandick Press, Inc., 22 Thames St., New York, U. S. A.

IN THE

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANT NATIONAL BROADCASTING COMPANY, INC.

I.

The absence of statutory support for the Order causes the Government to rely largely upon a restatement of the conclusions in the Report on Chain Broadcasting. The Government also attempts to persuade this Court that the Order is based upon a Report which is the equivalent of

administrative findings made upon a full and fair hearing such as to preclude a trial. This position of the Government should be contrasted with the contention made by it upon the previous appeal in this Court that the Regulations are nothing more than announcements of a licensing policy which can be tested only upon an additional record made before the Commission in individual licensing proceedings.

This attempt is disingenuous beyond the point to which lack of candor on the part of an administrative tribunal can be permitted to go. At the commencement of the investigation authorized representatives of the Commission stated that there were "no parties to this proceeding at all" and that the proceeding was not "a case that will be appealed anywhere" (p. 92, Appendix E to our main brief). On appeal the Government now attempts to use that investigation as if it had produced a record sufficient to preclude a trial on the merits. If this can be done, then the requirement of *Morgan* v. *United States*, 304 U. S. 1 (1938), that the administrative process must include the basic elements of fair play, is meaningless.

The Report is at most a collection of charges sufficient only to formulate a complaint. Throughout the brief the Government attempts to avoid that fact by making repeated assertions that there is no dispute or controversy with respect to any of the underlying facts (Br., pp. 40, 42, 52, 80, 131, 135, 137). Fundamental facts are very clearly in dispute.

But this is only part of the difficulty. The Commission has gone further and has openly stated that its Order is also based upon "conferences which followed the hear-

ings" and "testimony presented before the Senate Commitee on Interstate Commerce" (p. 97, Appendix E to appellant's main brief).

The Government now challenges appellants to specify what evidence they will wish to add to that already adduced in the course of the investigation. Appellants find themselves in the position either of ignoring that challenge in the Government's brief or of letting the challenge go by default. The challenge, of course, assumes the sufficiency of the hearings held pursuant to the Commission's investigation as far as those hearings went but it is this very assumption that the manner in which those hearings were held negates.

It is therefore true that appellants, without their day in Court, cannot effectively meet the picture painted by the Government in its brief upon the transcript of those hearings alone. The transcript does not contain the relevant facts and appellants' affidavits are directed only to the question of irreparable injury.

Unless and until there is a trial, appellants are bound by the four corners of the record in this Court, in spite of the fact that at the commencement of the investigation appellants were informed by the Commission that the case was not one that would be appealed anywhere. However, to demonstrate that there are vital matters which could and would be controverted were we given the opportunity to do so, appellants accept the challenge of the Government as to what appellants would prove upon a trial. As will be pointed out below in this brief, such evidence would not be solely directed to the prospective effect of the Regulations but would prove facts with respect to the actual past and present conduct of network broadcasting.

The conclusions in the Report on Chain Broadcasting are based upon four major fictions which we will now proceed to consider *seriatim*.

1.

The Fiction of the Limitation of Facilities.

The Commission has licensed less than three stations in many of the cities of the United States. Upon this limitation of facilities has been built the fiction that cities having fewer than four stations are prevented from hearing programs of one or more of the existing national networks if each station for one reason or another chooses to take its programs from only o. ? of the networks. For example, the Government states (Br. 26-27):

> "In cities where there are fewer than four stations—the great majority of the cities—such clauses [prohibited by the Order] totally exclude the programs of one or more of the existing national networks."

The fiction is easily exposed. It assumes that a city receives radio service only from stations located in the particular city. Everyday experience shows, however, that a city receives radio programs not only from stations located therein but also from stations located elsewhere. Indeed, the limitation of the facilities in a given area is often brought about by the very fact that otherwise programs from stations located outside the area would interfere with programs from stations within the area.

The Government would have this Court believe that Blue Network programs such as the Metropolitan Opera

Lowell Thomas, Raymond Gram Swing, the Boston Symphony and the Town Meeting of the Air cannot be heard in any city other than one *in* which the Blue Network has an affiliate (Br. 27). The Blue Network does not have any station in Racine, Wisconsin, or South Bend, Indiana, yet to suppose that the citizens of those cities and of the metropolitan areas surrounding them are unable to receive these outstanding programs from Chicago where Blue does have a station, is absurd. The Commission's standards of good engineering practice prove such absurdity and the Government is amply aware that the cities of Racine, Wisconsin, and South Bend, Indiana, together with their surrounding areas, do receive Blue Network programs even though the Blue Network does not have any station in those cities.

Mutual Broadcasting System, Inc. (MBS) does not have any station located in the metropolitan area of Trenton, New Jersey. Yet to contend that MBS programs are *excluded* from that city is preposterous. The Government knows that station WOR in New York gives full and complete service in Trenton. Furthermore, with reference to the Government's challenge as to what appellants would prove at the trial, appellants would prove that WOR advertises that it covers the following 16 cities:

Bridgeport, Conn.
New Haven, Conn.
Trenton, N. J.
Newark, N. J.
Allentown, Pa.
Philadelphia, Pa.
New York, N. Y.
Jersey City, N. J.
Paterson, N. J.

Yonkers, N. Y.
Camden, N. J.
Elizabeth, N. J.
Reading, Pa.
Wilmington, Del.
Waterbury, Conn.
Hartford, Conn.

In spite of this MBS and the Government would have this Court believe that MBS programs are excluded from these cities except where it has an affiliate located therein. Five of the above cities are ones of which MBS complains (R. 339-343).

2.

The Fiction of the "Domination" of the Air.

The Government's brief seeks to convey the impression that domination of the air exists through ownership by network organizations of many of the most desirable stations. The fact is that of 924 standard broadcast stations licensed in the United States only six, or approximately ½ of 1%, are licensed to NBC.

The next fiction used by the Government in attempting to prove dominance is the device of lumping NBC, CBS and the Blue together. This is done although the Report admits there is vigorous competition between the networks. By this manipulation the Government is able to cite the statistic that 85% of the nation's night-time wattage is licensed to or affiliated with these three networks. The thought sought to be conveyed thereby is that these three networks dominate 85% of the air. That is not the fact.

Answering the challenge of the Government as to what facts NBC would prove on a trial, one of the facts which NBC would show is that of the total population coverage of the 924 standard broadcast stations in the United States those on the NBC network have only approximately 15 to 18% of the total. Each of the four existing national networks has an approximately equal percentage of the total available population coverage by radio in the United States.

Moreover, as pointed out in our main brief, each station has ample time available for local purposes. The NBC option (except west of Denver) covers only 8½ hours of the broadcasting day consisting of 16 to 18 hours.

No charge of domination on the part of the network organizations can stand in the face of these facts.

3.

The Fiction of Restrictions Upon the Growth of MBS.

NBC commenced operations in 1926 with two networks, the Red and Blue. CBS commenced operations in 1927. MBS was not formed until 1934. Starting with a total of four stations, MBS became a national network in 1936 (R. 63). In 1940 MBS had expanded to a network of 160 stations (R. 63) and at the present time it comprises over 200 stations. MBS's total time sales have grown from $1,100,000 in 1935 (R. 64) to $9,636,122.49 in 1942.

Since 1936, when MBS attained the status of a nation-wide network, the contracts of affiliation between NBC and the licensees affiliated with it and the contracts of affiliation between CBS and the licensees affiliated with it, have, in practically every instance, expired and, consequently, from

1936 to the present time practically every standard broadcast station licensee in the United States has been available for affiliation with MBS (R. 370). That there has been competition in the network-station market is apparent from the fact that all four national networks have been entering into affiliation contracts with previously unaffiliated stations since 1936 and the fact that affiliates shift from time to time from one network organization to another (R. 370).

The choice of a station licensee is not restricted by the affiliation contracts, but is based solely upon the program and other service offered by the various network organizations competing for the opportunity to enter into or continue affiliation with the particular station licensee. The Commission can hardly complain that the program service offered by NBC, CBS or Blue is sufficient to attract affiliates even though that service be based upon longer experience and better reputation in the field.

Program service is made up of two factors: The amount and quality of commercial programs offered and the amount and quality of sustaining programs offered. Other network services include the assumption of wire line costs and the sale of station time to national advertisers. The Commission's Report itself shows that the MBS method of operation requires affiliates in most instances to assume the cost of the wire lines and that MBS does not itself supply a continuous schedule of sustaining programs (R. 75-76, 79, 234-235). Many stations are unwilling to assume the cost of the wire lines and prefer the method of the other three networks in the production and distribution of sustaining programs.

4.

The Fiction of a Continuous Supply of Programs.

The Government would have the Court believe that the networks are in possession of a continuous supply of programs, only the distribution of which might be slightly inconvenienced by the abolition of option time. The Commission Report proceeds as though the four networks were four spigots from which any station could make a selection at will and by the mere act of turning on the spigot cause a continuous flow of programs to come forth. The fact is, as is pointed out in appellant's main brief, that there can be no such supply of programs without option time, for option time alone makes possible the economic support without which those programs could not be put on the air. No national network operates without option time.

Nor is the necessity merely one of rapid communication, the impression which the Government seeks to convey. Without the continuing certainty that the option is available and that requisite circulation can be delivered for nation-wide network broadcasting, the advertisers would not advertise by way of nation-wide network broadcasting.

The Commission attempts to brush aside the fact that option time is absolutely essential to network broadcasting, in spite of the fact that Regulation 3.104 is premised upon that very fact, by urging that it was adopted by NBC as a competitive measure rather than because of the practical exigencies of network broadcasting.

Some of the evidence which NBC would adduce to disprove this impugning of motive would be the testimony of the independent business research organization upon

whose advice NBC adopted option time in 1935 after suffering heavy disabilities through trying to operate without it. The *amicus* briefs of the American Association of Advertising Agencies and the Association of National Advertisers, make it apparent that this evidence will be firmly supported by the testimony of the advertisers themselves. This is a field in which the Commission has no expert knowledge or competence whatsoever.

Indeed, these *amicus* briefs clearly show that the effect of Regulation 3.104 will be disastrous to the present diversified system of network broadcasting, will benefit only the best stations and will result in a monopoly of national commercial programs in the best stations in each area, as described at pages 96 to 97 of appellant's main brief. To this the Government, even in argument, can only answer (Br. fn., p. 98) that the Commission will attempt to deal with the diastrous effects of the Order after they have occurred. Instead of merely attempting to regulate the network organizations, it is there proposed that the Commission should also regulate the advertisers.

Moreover, once the best stations in each area have obtained the lion's share of commercial programs, there is no probability that they would be willing to grant an option upon their time to a network organization or anyone else. In protecting against the effect of the Order, the Commission would then be compelled either to require those stations to grant an option to the network organizations or to require those stations to reject the programs of the advertisers, either one of which would not only interfere with the freedom of the station to exercise its own responsibility as to what it desired to broadcast but would also be a direct infringement of freedom of speech by radio.

II.

In attempting to support the Order on the ground that it is reasonable, the Government points to the fact that appellants in this case address themselves primarily to Regulation 3.104. The Government even goes so far as to attempt to negative the fact that appellants would be irreparably injured if the Order were to become effective. This argument is advanced in spite of the fact that the District Court has found (R. 533) that appellants would be irreparably injured if the Order should become effective.*

The Government in its brief, in attempting to deny the disastrous effects which the Regulations will have on network broadcasting, again protests that the Order is merely an expression of licensing policy (Br., pp. 40, 77, 127). This contention stands uneasily beside the holding of this Court on the previous appeal that the Regulations require the Commission "to reject and authorize it to cancel licenses on the grounds specified in the Regulations without more."

It is true that *present* irreparable injury, in so far as NBC is concerned, arises primarily from Regulation 3.104. The NBC affiliation contracts do not contain some of the provisions at which some of the other regulations are directed. The irreparable injury which Regulation 3.107 would inflict has been postponed by an indefinite postponement by the Commission of that Regulation. Irreparable

* Since the prior appeal to this Court, appellants submitted an additional affidavit (R. 517) showing that the Commission minute involved in the prior appeal did not operate to mitigate the damage to NBC described in the affidavits submitted in support of appellants' motion for preliminary injunction.

injury, however, goes only to the jurisdiction of the courts to review the Order, which has been established by the previous decision of this Court, and to the question whether the Order is arbitrary and capricious even if within the orbit of the Commission's jurisdiction. This appeal, however, raises the far broader question of the validity of the power asserted by the Commission in promulgating the Order upon which all of the regulations depend.

The vast, undefinable and unrestricted power asserted by the Commission in support of the Order has been advanced by the Government in its brief in this Court. As in the court below, the Government here prefers to rely upon certain alleged "principles" which it purports to find in the statute rather than upon the specific statutory provisions themselves. The exegesis whereby the principles are evolved gains plausibility, however, solely from a posited need to meet the supposed evils in network broadcasting (which appellants deny and would disprove at the trial) and not from an appraisal of the statute itself. The statutory provisions upon which the alleged "principles" are based are discussed in our main brief and, as there pointed out, they do not support the power asserted.

In addition, the scope of the statutory standard of public interest, convenience or necessity as used in the Communications Act of 1934 is sought to be expanded and given meaning by reliance upon cases in the public utility field. See, *e.g.*, the use of *United States* v. *Lowden*, 308 U. S. 225; *Interstate Commerce Commission* v. *Railway Labor Executives Assn.*, 315 U. S. 373 and *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35, at pages 61 to 63 of the Government's Brief, each of which defines the term "public inter-

est'' in an entirely different context wholly irrelevant to the Communications Act of 1934.

The Government relies in support of the Commission's power to promulgate general regulations governing its licensing function upon *Securities and Exchange Commission* v. *Chenery Corporation*, decided February 1, 1943 (Government Brief, p. 77): This case arose under the Public Utilities Holding Company Act of 1935, a statute vesting the SEC with far more comprehensive powers for far different purposes than those of the Federal Communications Commission under the Communications Act of 1934.

The Government also relies upon the fact that the Communications Act of 1934 makes each licensee responsible for the operation of its station and requires the consent of the Commission to a transfer of the license. There is no valid relation, however, between these statutory requirements and the Order. This is made fully apparent by the fact that the Commission protests that the Order, while banning options, permits the outright sale of any amount of time to a network organization. Both the Commission and the Government recognize the necessity for network broadcasting and the corollary necessity for the delegation of the production of programs. No individual station licensee can conduct network broadcasting and create all of its programs and these functions must be performed by others.

Finally, the Government attempts to make appellants' argument limit the Commission solely to physical matters. Such is not their argument. Certain other matters must inevitably go along with the necessity to license stations in

order to prevent interference. Most of these are discussed in our main brief and include the equitable geographical distribution of available facilities, the distribution of facilities among applicants, and an appraisal of the character and ability of the licensee. All of these matters, however, are specified in the statute itself.

Appellants wish here to point out that they have not raised the grave and important issue of freedom of speech by radio as a shield against regulatory powers fairly to be found in the provisions of the Act. The Government, the Commission and the District Court agree with appellants' contention that the Order itself represents a direct interference with the freedom of speech by radio. This, however, is only part of the infirmity to which the Order is subject under the First Amendment. The extreme scope of the power asserted by the Order and the vague and undefined language to which its proponents have been compelled to resort in order to support the asserted power have raised in a manner which cannot be avoided the broader issue as to whether freedom of speech by radio can continue to exist under a licensing authority so undefined in scope.

Respectfully submitted,

JOHN T. CAHILL,
Solicitor for National Broadcasting Company, Inc.

Of Counsel:
JAMES D. WISE,
A. L. ASHBY,
HAROLD S. GLENDENING,
JOHN W. NIELDS.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 554.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

MOTION FOR TEMPORARY RESTRAINING ORDER, NOTICE OF MOTION AND AFFIDAVIT IN SUPPORT OF MOTION.

JOHN T. CAHILL,
Solicitor for National Broadcasting Company, Inc.

E. WILLOUGHBY MIDDLETON,
Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

Supreme Court of the United States

OCTOBER TERM, 1942.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

No. 554.

Motion for Temporary Restraining Order.

Upon the annexed affidavit of Frank E. Mullen, sworn to February 9, 1943, the complaint and all of the affidavits and papers filed herein and set forth in the transcript of record on this appeal, and all the proceedings heretofore had herein, the appellants move this Court for an order suspending the Order of the Federal Communications Commission, one of the appellees herein, in Docket No. 5060, made May 2, 1941, as amended October 11, 1941, the order involved on this appeal, until ten days after the filing in the District Court of the mandate upon this Court's decision on this appeal, in order that the *status quo* may be adequately preserved; and for such other and further relief as to this Court may seem just.

Dated: February 9, 1943.

JOHN T. CAHILL,
Solicitor for National Broadcasting Company, Inc.

E. WILLOUGHBY MIDDLETON,
Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

Supreme Court of the United States

OCTOBER TERM, 1942.

NATIONAL BROADCASTING COMPANY, INC.; WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

No. 554.

Notice of Motion.

SIRS:

PLEASE TAKE NOTICE that the above motion will be submitted to the Court at the Courthouse of the Supreme Court of the United States, Washington, D. C., on the day on which the appeal herein is called for argument, at 12:00

o'clock noon on that day or as soon thereafter as the motion can be submitted.

Dated, February 9, 1943.

JOHN T. CAHILL,
Solicitor for National Broadcasting Company, Inc.

E. WILLOUGHBY MIDDLETON,
Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

To:

CHARLES FAHY, Esq.,
Solicitor General,
Department of Justice,
Washington, D. C.

CHARLES R. DENNY, Esq.,
General Counsel,
Federal Communications Commission,
Washington, D. C.

LOUIS G. CALDWELL, Esq.,
Counsel for Mutual Broadcasting System, Inc.,
Washington, D. C.

Supreme Court of the United States

OCTOBER TERM, 1942.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, Appellants, *vs.* UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION. MUTUAL BROADCASTING SYSTEM, INC., Intervenor.	No. 554

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
CITY, COUNTY AND STATE OF NEW YORK, } ss.:

FRANK E. MULLEN, being duly sworn, deposes and says:

I am a Vice President and General Manager of National Broadcasting Company, Inc., one of the appellants herein. I am making this affidavit in support of appellants' motion to suspend the Order of the Federal Communications Commission of May 2, 1941 (as amended October 11, 1941) which is the subject matter of the appeal now pending before this Court.

This is an appeal from a district court decree dismissing a suit by appellants to set aside, annul and permanently enjoin the enforcement of the orders of the Federal Communications Commission (hereinafter called the "Commission") promulgating regulations applicable to radio sta-

tions engaged in chain or network broadcasting. For a description of the suit, I respectfully refer the Court to the Statements in appellants' briefs on this appeal.

The object of appellants' annexed motion is to restrain enforcement of the regulations for an appropriate period after April 1, 1943, or the decision of this Court on this appeal, whichever is earlier. The District Court on November 16, 1942 entered an order accompanying its opinion rendered on that date restraining enforcement of the regulations until February 1, 1943, or the argument of the appeal, whichever was earlier (R. 533-534).

After the allowance of the appeal, the Commission was requested to enter into a stipulation which would suspend the orders promulgating the regulations until ten days after the determination of this appeal or the termination of this term of the Court, whichever should occur earlier. The Commission refused to enter into such a stipulation, but on January 20, 1943 adopted the following minute:

"BROADCAST MATTER:

"HEARING DOCKET

"The Commission today suspended until April 1, 1943, or the date of the decision by the Supreme Court of the United States in cases Nos. 554 and 555, whichever is earlier, the effectiveness of the Commission's Order of May 2, 1941 in Docket No. 5060, as last amended October 11, 1941."

The present motion was made necessary by the failure of either the District Court's temporary restraining order or the minute to provide appellants with protection from enforcement of the regulations for the period from April 1, 1943 until the decision of this appeal, in the event that the appeal is not decided prior to April 1, 1943, and for a reasonable period after the decision of the appeal.

I respectfully submit that, for the following reasons, extension of the restraint upon the enforcement of the regula-

tions for ten days after the filing in the District Court of the mandate upon this Court's decision on the appeal would be appropriate in this case, regardless of whether the decision below is reversed or affirmed.

If the decision below is reversed, it is clear that appellants should be protected by a temporary restraining order and injunction until final determination of the action.

The reasons for the granting of such relief as is requested herein are set forth in the Findings of Fact and Conclusions of Law upon which the restraining order of the District Court was based, as follows (R. 533):

> "1. That if the Federal Communications Commission, pending the plaintiffs' appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; the plaintiffs will be seriously and irreparably damaged."

Facts amply supporting these Findings and Conclusions as to appellants' right to a stay pending the appeal are fully set forth in the affidavit of Niles Trammell, verified October 30, 1941 (R. 225-253), before this Court in *National Broadcasting Company, Inc., et al. v. United States of America, et al.*, October Term, 1941, No. 1025, the affidavit of Frank E. Mullen, verified January 3, 1942, with exhibits annexed (R. 429-443) on appeal No. 554, and affidavit of Frank E. Mullen, verified August 31, 1942, with exhibits annexed (R. 517-521) on appeal No. 554, to which I respectfully refer the Court in lieu of repetition of such facts in this affidavit. The danger of irreparable injury to National Broadcasting Company, Inc. and Stromberg-Carlson Telephone Manufacturing Company if enforcement of the regulations is not restrained is as great now as it was when those affidavits were made.

If the decision below is affirmed, appellants should be given a reasonable opportunity to make whatever arrangements are necessary with its 139 affiliated stations.

Ten days after the filing of the mandate is the very minimum amount of time which National Broadcasting Company, Inc. will need.

The pressing need of appellants for a stay until the filing in the District Court of a mandate upon this Court's decision on this appeal, and for a period of ten days thereafter, is to be contrasted with the lack of any showing by the appellees of any urgent public interest. The District Court pointed out in its Findings of Fact (R. 533):

> "III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest."

WHEREFORE, appellants National Broadcasting Company, Inc. and Stromberg-Carlson Telephone Manufacturing Company pray that this Court enter an order granting the relief set forth in the accompanying motion.

FRANK E. MULLEN
(FRANK E. MULLEN)

Subscribed and sworn to before me
this 9th day of February, 1943.

FLORENCE E. MARGER
Notary Public.
Queens Co. No. 2625 Reg. No. 6868
Cert. Filed in N. Y. Co. No. 573 Reg. No. 3-M-369
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(SEAL)

FILE COPY

Nos. 554–555

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 554

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., APPELLEES

No. 555

COLUMBIA BROADCASTING SYSTEM, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 554

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., APPELLEES

No. 555

COLUMBIA BROADCASTING SYSTEM, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

OPINION BELOW

The district court wrote a single opinion granting the motions for summary judgment which the

Government had filed in the two cases. This opinion appears at pages 522–532 of the NBC record (No. 554) and at pages 483–493 of the CBS record (No. 555).

Earlier opinions of the lower court and of this Court are reported as follows: The opinion of the district court on the Government's motions to dismiss for lack of jurisdiction (NBC R. 456–469) is reported in 44 F. Supp. 688. The per curiam opinion of the district court granting a temporary stay pending appeal (NBC R. 473–474) is reported in 44 F. Supp. 696. The opinion of this Court holding that the district court has jurisdiction of the cases (NBC R. 476–510) is reported in 316 U. S. 407.

JURISDICTION

The decision of the court below was entered on November 16, 1942. Petitions for appeal therefrom were filed on November 25, 1942, and were allowed on the same day (NBC R. 534–537; CBS R. 496–497). On December 14, 1942, this Court noted probable jurisdiction. The jurisdiction of this Court on appeal rests on the Act of October 22, 1913, 38 Stat. 219, 220, 28 U. S. C., secs. 47–47a, as extended by the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C., sec. 402 (a).

QUESTIONS PRESENTED

The Federal Communications Commission is authorized to license radio stations where it finds that the public interest, convenience or necessity

will be served. In addition, it is empowered "to make special regulations applicable to radio stations engaged in chain broadcasting." Beginning in 1938 the Commission undertook an extensive investigation of chain broadcasting practices. Hearings were held and a record of over 8,000 pages of testimony and more than 700 exhibits was compiled. Approximately two-thirds of this record represents evidence presented by the appellant networks.

The investigation disclosed the dominant position of the appellant networks in the broadcasting field. At the end of 1938 over 85% of the nation's total nighttime broadcasting power was available exclusively to these networks; in fact, many of the most desirable stations were actually owned by them. The business done by NBC and CBS represented more than half of the entire business of the industry.

The investigation further disclosed that the standard contracts between the appellant networks and their affiliated stations prevented the stations for five years from taking programs from any other network; similarly, the network was prevented from furnishing its programs to any other station in the service area of its regular affiliate—even those programs which the regular affiliate did not carry. Also, NBC and CBS held options by which they could require their affiliates on 28 days' notice to substitute a network

commercial program for any program the affiliate had scheduled. In addition, the affiliates were given only limited opportunity to reject network commercial programs which they deemed unsuitable. The restraints on competition were further aggravated by the fact that NBC and CBS themselves owned many of the most desirable stations and particularly by the fact that NBC operated two networks—the "Red" and the "Blue." The Commission found that these provisions and circumstances were contrary to the public interest in that they tended to divest individual licensees of their statutory responsibility for the operation of their stations, prevented the widest and most effective use of radio facilities, and restrained competition in the broadcasting field.

To meet this situation the Commission promulgated the eight chain broadcasting regulations, set out below (pp. 5–9), the validity of which is challenged by these suits. The questions presented on these appeals from the orders of the district court dismissing the appellants' complaints are as follows:

1. Whether the Commission has statutory authority to adopt the regulations in question.

2. Whether the regulations are arbitrary or capricious.

3. Whether, if the Communications Act authorizes the Commission to adopt the regulations, such Act unconstitutionally delegates legislative power or abridges freedom of speech in violation of the First Amendment.

4. Whether the court below properly disposed of the cases on the basis of the administrative record, the pleadings, and the motions, without taking further evidence.

STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934, 47 U. S. C. secs. 151, et seq., are set forth in the Appendix, *infra*, pp. 139–149.

REGULATIONS INVOLVED

The Chain Broadcasting Regulations provide as follows:

> SEC. 3.101. *Exclusive affiliation of station.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization[1] under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.
>
> SEC. 3.102. *Territorial exclusivity.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or

[1] The term "network organization" as used herein includes national and regional network organizations.

hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

SEC. 3.103. *Term of affiliation.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided,* That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

SEC. 3.104. *Option time.*—No license shall be granted to a standard broadcast station which options[2] for network programs any

[2] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

time subject to call on less than 56 days' notice, or more time than a total of three hours[3] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8:00 a. m.[4] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

SEC. 3.105. *Right to reject programs.*— No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding; express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to

[3] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight-saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

[4] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight-saving time or vice versa.

network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

SEC. 3.106. *Network ownership of stations.*—No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control[5] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

SEC. 3.107. *Dual network operation.*—No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided,* That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served

[5] The word "control" as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

by the group of stations comprising each such network.

SEC. 3.108. *Control by networks of station rates.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

[*Effective date.*] These regulations shall become effective immediately: *Provided,* That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941: *Provided further,* That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties: *And provided further,* That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.

STATEMENT

These suits were brought on October 30, 1941, to enjoin the enforcement of the Commission's regula-

tions, relating to radio stations engaged in chain broadcasting,[6] which were adopted by the Federal Communications Commission on May 2, 1941, and amended October 11, 1941. There are eight such regulations, designated by the Commission as Regulations 3.101 to 3.108, inclusive (*supra*, pp. 5–9).

At the time they brought these suits the plaintiffs, National Broadcasting Company, Inc. (herein called NBC), and Columbia Broadcasting System, Inc. (herein called CBS), operated three of the four nation-wide "chains" or "networks."[7] Plaintiffs, Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, were the licensees respectively

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[6] Chain broadcasting is the principal means by which particular radio programs are made simultaneously available to all or a large part of the national radio audience. It is defined in Section 3 (p) of the Communications Act as the "simultaneous broadcasting of an identical program by two or more connected stations" and is accomplished by sending the program by telephone wire from its point of origin to each of the outlet stations of the chain or network for broadcasting over their transmitters. These outlet stations are in some instances owned and operated by the network organizations themselves, but more commonly they are independently owned and are associated with the network by means of an "affiliation contract."

[7] NBC then operated two networks known as the "Red" and the "Blue," but shortly after suit was begun NBC advised the court below that it had disposed of the Blue network (NBC R. 458). NBC has transferred the Blue network to a new corporation—Blue Network, Inc.—which, like NBC, is a wholly owned subsidiary of the Radio Corporation of America (NBC Br. 5).

of Stations WOW at Omaha, Nebraska,* and WHAM, at Rochester, New York, which are affiliated with NBC and thereby are engaged in chain broadcasting (NBC R. 4, 5, 6).

The United States and the Federal Communications Commission were joined as defendants in the suit brought by NBC. The CBS suit was brought against the United States alone, but the Federal Communications Commission intervened as a defendant. Mutual Broadcasting System, Inc., which operates the fourth national network, intervened in both cases as a defendant. The complaint of NBC, Woodmen, and Stromberg (No. 554) requests the Court to enjoin the enforcement of all eight of the Commission's chain broadcasting regulations. The CBS complaint (No. 555) seeks an injunction against Regulations 3.101 to 3.106 only. Both complaints allege in substance that the Federal Communications Commission has no power under the Communications Act of 1934 to issue the regulations in question, and that they are arbitrary, unreasonable, unconstitutional, and without basis in the evidence (NBC R. 15; CBS R. 10–11).

On November 8, 1941, the Government filed motions to dismiss the complaints or, in the alterna-

*The Commission on December 15, 1942, authorized the transfer of Station WOW from Woodmen of the World Life Insurance Society to Radio Station WOW, Inc., and is now advised that this transfer was consummated on January 14, 1943 (File B4–AL–354).

tive, for summary judgment (NBC R. 387–388; CBS R. 469)*. On February 1, 1942, the motions to dismiss for lack of jurisdiction were granted (NBC R. 456–469); but on appeal, this Court on June 1, 1942, reversed and remanded the case for further proceedings (NBC R. 476–510). On the remand reargument was held on the Government's motions for summary judgment. The motions were granted, and the complaints were dismissed (NBC R. 522–534; CBS R. 483–494).

THE COMMISSION'S INVESTIGATION, REPORT, AND REGULATIONS

1. THE PROCEEDINGS BEFORE THE COMMISSION

The regulations attacked in these suits were adopted by the Commission as the result of an investigation instituted on March 18, 1938, "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity" (NBC R. 27–28; CBS R. 36–38).

On April 6, 1938, a committee of three commissioners was appointed to hold hearings and to make a report with recommendations to the Commission.

The national and regional networks, station licensees, and recording and transcription companies were invited to appear and present evidence.

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*Upon the filing of these motions a stipulation was entered into for the suspension of the regulations pending a hearing on the motions (NBC R. 454; CBS R. 474–475).

Other persons who requested an opportunity to appear were heard. The committee held hearings between November 14, 1938, and May 19, 1939 (NBC R. 389; CBS R. 470–471).[10]

On June 12, 1940, the committee issued its report. Thereafter, briefs were filed on behalf of the national networks and other interested parties, and oral arguments were presented before the full Commission. On May 2, 1941, the Commission issued its Report, together with an order adopting the eight regulations here attacked.[11] The Commission's Report deferred for 90 days the effective date of the regulations with respect to existing contracts and licenses of network-operated stations. Subsequently, the effective date was postponed by the Commission pending action by the Commission on a petition filed by Mutual for amendments to two

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[10] The record before the Commission was filed with the court below in support of the Government's motions to dismiss the complaint or in the alternative for summary judgment, and also in opposition to appellants' motions for preliminary injunction (NBC R. 263, 392; CBS R. 355, 473). This record has been certified to this Court as an original exhibit. It has not been printed, but the parties have stipulated that it may be referred to in the briefs (NBC R. 546–547; CBS R. 506). It is referred to hereafter as "Tr."

[11] The Commission's Report is attached to NBC's complaint as Exhibit D (R. 29–200) and to the CBS complaint as Exhibit B (R. 49–216). Two of the seven commissioners filed additional views, which are included in the Report, dissenting from the action taken by the Commission.

of the regulations (NBC R. 389–390; CBS R. 471–472).

The Mutual petition, filed August 14, 1941, asked the Commission to amend Regulations 3.103 and 3.104. Briefs were filed by the national networks and one regional network, and oral argument was had before the Commission on September 12, 1941. Thereafter, on October 11, 1941, the Commission issued a Supplemental Report,[12] together with amendments to three of the regulations (3.102, 3.103, and 3.104). The Commission simultaneously postponed the effective date of the regulations with respect to existing contracts and licenses of network-operated stations until November 15, 1941, and suspended the effective date of Regulation 3.107 indefinitely, with the provision that any subsequent order of the Commission placing Regulation 3.107 into effect should provide for not less than six months' notice (NBC R. 390–392; CBS R. 472–473).[13] As set forth above, these suits were

[12] The Supplemental Report is attached to the NBC complaint as Exhibit E (R. 201–217) and to the CBS complaint as Exhibit C (R. 20–36). Two of the six commissioners (there being at that time one vacancy on the Commission) dissented from the Supplemental Report in an opinion included therein.

[13] On October 31, 1941, the Commission adopted a Minute (NBC R. 391–392; CBS R. 472–473) with reference to the procedure which it proposes to follow in applying the policies announced in the chain broadcasting regulations. The Minute sets forth that if any licensee wishes to contest the validity of the regulations or the reasonableness of their

filed on October 30, 1941. Since that date the regulations have been suspended either by court order or by order of the Commission."[14]

2. FACTS DEVELOPED BY THE COMMISSION'S INVESTIGATION

a. *Background.*—The chain broadcasting regulations here attacked are applicable to radio broadcasting stations operated in the "standard broadcast band." This band—550 kilocycles to 1600 kilocycles[15]—is a small portion of the entire radio spectrum, the balance of which is allocated for other radio uses.

Within the standard band there are approximately 106 "channels" available for broadcasting

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application to the particular licensee, the license will be designated for hearing. It further provides that such licensee will be granted a temporary extension of his license so that he may remain on the air pending the proceeding before the Commission and pending appeal to the courts from a decision in any such proceeding; and, further, that in the event the validity of the regulations as applied to the licensee should be upheld, the Commission would nevertheless grant a regular license to the licensee if he thereupon conforms to the decision in the litigation.

[14] On January 19, 1943, the Commission adopted a minute suspending the effective date of the regulations until April 1, 1943, or the decision of this Court, whichever is earlier.

[15] Federal Communications Commission Rules and Regulations, Part 2, Appendix B, Frequency Allocations. A copy of the Commission's Rules and Regulations has been filed with the Clerk.

stations.[16] These 106 channels are occupied by some 900 licensed broadcast stations. The number of stations which can be placed on a single channel without causing wasteful interference is determined by the power and location of the stations, and the design of their transmitting antennae.[17]

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[16] In order that there be opportunity for effective selection by listeners among radio stations, the Commission's rules require a separation of 10 kilocycles between each channel. (See Federal Communications Commission Rules and Regulations, Sec. 3.3.)

[17] On six channels the Commission licenses only "local" stations operating with power of 100 or 250 watts; many such stations can be assigned to a single channel, as each station renders service to only a small area. About 40 channels are assigned for the medium-sized "regional" stations, which utilize from 500 watts to 5 kilowatts power, and about 45 channels for the powerful "clear channel" stations, which may use from 10 to 50 kilowatts.

Depending on power, location, and antenna design, from one to four clear channel stations can usually be placed on a single channel. These large stations are important in furnishing service to the rural areas. Both day and night, they furnish a reliable and consistent "primary" service which may extend as far as 150 miles from the transmitter. At night, such stations also furnish a "secondary," or "sky-wave" service, which results from the reflection of radio waves from the so-called Kennelly-Heaviside layer, many miles above the surface of the earth. This "secondary" service extends for hundreds of miles from the transmitter, and is the only radio service which large areas of the country receive, but it is weaker, and more fluctuating and uncertain, than "primary" radio service, and in general is usable only between sunset and sunrise. See Sec. 3.11, Federal Communications Commission Rules and Regulations, and Standards of Good Engineering Practice Concerning Standard Broadcast Stations, Sec. 1.

The limited portion of the radio spectrum available for broadcasting restricts not only the total number of broadcast stations, but, if fair distribution is to be made, the number which can be established in particular communities. New York City, Chicago, and Los Angeles have a dozen or more stations each, and most of the other very large cities have from 5 to 8 stations. Some 35 cities have 4 or more full-time[18] stations, and some 25 others have 3 (NBC R. 87, 104; CBS R. 107, 124).

All these stations, depending on their power and the nature of the surrounding territory, serve a variety of functions and purposes. The programs which they provide may be local, regional, or national in character. Except for a few non-commercial stations, however, all of them are supported by selling time for the use of their broadcasting facilities for advertising purposes. These revenue-producing programs are called "commercial" or "sponsored" programs, as distinguished from "sustaining" programs, which are provided by the station itself without commercial sponsorship (NBC R. 41, 75–76; CBS R. 61, 95–96).

Because no single station or small group of stations is able to provide truly national coverage,

[18] Some stations are authorized to operate only in the daytime or only during certain specified hours. (See Sec. 3.23, Federal Communications Commission Rules and Regulations.)

and because many programs of national interest cannot be produced by single stations with limited resources and remote from talent centers and the scene of national events, the need for chain broadcasting became manifest soon after broadcasting first began in 1920 (NBC R. 40, 41; CBS R. 60, 61).

b. *The National Broadcasting Company.*—In September 1926, the Radio Corporation of America formed NBC as a subsidiary corporation to take over its broadcasting business, including properties purchased at that time from the Telephone Company. To the original three stations (WEAF and WJZ in New York and WRC in Washington) operated directly by, and licensed to, NBC, seven others were added—one each in Washington, Cleveland, and Denver, two in Chicago, and two in San Francisco. All but three of these ten stations operate with power of 50,000 watts, the maximum permitted under the Commission's regulations (NBC R. 52; CBS R. 72). The number of stations regularly on the two NBC networks increased rapidly from 19 in November 1926 to 221 in February 1941. These 221 stations comprised over one-fourth of all the licensed broadcasting stations in the United States (NBC R. 51; CBS R. 71).

Commercial expansion kept pace with physical expansion. The total time sales of the NBC networks amounted to but $3,384,519 in 1927; in 1940 they totaled over $41,000,000. The net income defi-

cit in 1927 is in equally sharp contrast to net income of over $5,800,000 in 1940 (NBC R. 53; CBS R. 73).

At the time these suits were filed, NBC continued to maintain and operate two networks, the "Red" and the "Blue".[19] Each had a separate "basic" network[20] of some 26 stations. In many respects the organizational and operational structures of the Red and Blue networks were intermingled. NBC's affiliation contracts did not specify with which of its two networks a station was to be associated, and since the Red network has consistently been far more profitable than the Blue, this was a matter of serious moment to the affiliates. The properties and accounts of the two networks were not segregated (NBC R. 81; CBS R. 101; Tr. 2560–5). Since the institution of these suits NBC has transferred the Blue network to a new corporation—Blue Network, Inc.—which, like NBC, is a wholly owned subsidiary of the Radio Corporation of America. Three of the 16 stations formerly licensed to NBC have been transferred to the Network, Inc., and a fourth—WMAL in Washi

[19] According to the affidavit of Niles Trammell, NBC President, as of June 1, 1941, there were 70 stations on the "Red," 99 on the "Blue," and 54 available to either (NBC R. 232).

[20] The "basic" network stations are all located in the thickly populated northeastern quarter of the United States. Generally speaking, advertisers are required to purchase at least the "basic" network during evening hours (Affidavit of Niles Trammell, NBC R. 241).

ton, D. C.—has been transferred to the M. A. Leese Radio Corporation (NBC R. 366).

c. *The Columbia Broadcasting System.*—The organization which later became the Columbia Broadcasting System was incorporated in New York on January 27, 1927, although it did not acquire its present name until two years later (NBC R. 57; CBS R. 77; Tr. 2927, 2952).

CBS has never operated more than one network. In 1927, 15 stations comprised the network; by the end of 1940 there were 121 outlets, comprising nearly 15 percent of the licensed broadcasting stations in the United States (NBC R. 59; CBS R. 79). CBS is also the licensee of eight stations, in New York, Washington, Boston, Chicago, Minneapolis, St. Louis, Los Angeles, and Charlotte, N. C. Seven of them operate with power of 50,000 watts, the maximum permitted (NBC R. 59; CBS R. 79).

In 1928 the total time sales of the organization amounted to about $1,400,000; in 1940 they totaled $35,630,063. Net income deficits were sustained during the first two years of operation but never thereafter, and in 1940 CBS's net income exceeded $7,430,000. (NBC R. 60; CBS R. 80.)

d. *The Mutual Broadcasting System.*—The newest national network, Mutual, dates from September 1934. Originally composed of four stations, by the end of 1940 there were 160 stations on the network, comprising about 19 percent of all the

licensed broadcasting stations in the United States (NBC R. 62; CBS R. 82; Tr. Exh. 386). As of January 1940, the network corporation was owned by Station WOR in New York, Station WGN in Chicago, and the Don Lee regional network on the Pacific Coast (each of which owned 25 percent of the network corporation's stock) and by four other broadcasting enterprises (NBC R. 64; CBS R. 84).[21] Station WOR is controlled by R. H. Macy & Co., and Station WGN by the Chicago Tribune (NBC R. 52; CBS R. 72; Tr. Exh. 431, 436, 437).

Although Mutual's commercial growth has also been substantial, its total network times sales remain small as compared to those of NBC and CBS. Total time sales in 1935 of about $1,100,000 had increased by 1940 to some $3,600,000. In general, the stations affiliated with Mutual operate with lower power than those affiliated with NBC and CBS (NBC R. 64; CBS R. 84).

c. *Status of the networks in the broadcasting field.*—The dominant position of the networks in the broadcasting field, and in particular the power and importance of NBC and CBS, were clearly shown by the facts developed at the hearings. As

[21] Six percent of the stock was then held by each of the following: The Colonial Network (a regional network in New England), the United Broadcasting Company (the licensee of stations in Cleveland and Columbus), the Cincinnati Times-Star Company (licensee of WKRC in Cincinnati), and the Western Ontario Broadcasting Company operating station CKLW at Windsor, Ontario, near Detroit.

of the end of 1938,[22] 40 percent of all the licensed broadcasting stations in the United States were affiliated with CBS or NBC. But this by no means fully reflects their stature. The stations affiliated exclusively with NBC utilized over 50 percent of the Nation's total nighttime broadcasting power. The stations affiliated exclusively with CBS accounted for 35 percent of the nighttime power. The stations affiliated exclusively with Mutual accounted for 6.3 percent, and those unaffiliated with any national network used but 2.1 percent of the total nighttime power. (NBC R. 67; CBS R. 87.)[23]

The stations operated by and licensed to NBC and CBS (*supra*, pp. 18, 20) included 14 stations operating on clear channels with the maximum permissible power of 50,000 watts; these 14 comprised almost half the nation's highest-power clear channel stations (NBC R. 67; CBS R. 87).

The proportion of the nation's total broadcasting business handled by NBC and CBS is equally significant. In 1938 the total net time sales for the entire industry amounted to slightly over $100,-

[22] Unless otherwise stated, all figures in this subsection (c) are as of the end of 1938, the date of most of the exhibits in the proceeding before the Commission.

[23] Thirty stations affiliated both with Mutual and with one of the other networks accounted for 5 percent of the total nighttime power. The figures cited are for stations licensed to broadcast for unlimited time, but, as the Report points out, the inclusion of part-time stations would not significantly alter the results (NBC R. 67; CBS R. 87).

000,000. Over $44,000,000, 44 percent of the total, represented network time sales of NBC and CBS. In addition, the stations operated by and licensed to NBC and CBS had net time sales for non-network programs of about $6,735,000.[24] Accordingly, the NBC and CBS networks, and the stations owned or operated by NBC and CBS, accounted for half the total business of the entire industry. In sharp contrast, the net time sales of Mutual for that year were but slightly over $2,000,000, about two percent of the sales of the entire industry. Similarly the consolidated net operating income of NBC and CBS from network programs and from the operations of their own stations totalled over $9,000,000, about half the consolidated net operating income for the entire industry. (NBC R. 68–69; CBS R. 88–89.)

f. *Contractual arrangements between networks and affiliates.*—There are two basic types of programs—commercial programs which are sponsored by advertisers, and sustaining programs, which no advertiser sponsors and from which, accordingly, no advertising revenue is received. Sustaining programs are made available by the national networks to their respective affiliates at no separate charge. Both NBC and CBS maintain studios and program staffs, and produce and offer sustaining programs to their affiliates. Mutual does not itself produce sustaining programs other than news

[24] There are no comparable figures for Mutual, since Mutual neither owns nor operates any stations.

broadcasts originating abroad; instead it selects programs which it considers suitable for its network from among the sustaining programs produced by its affiliates, and arranges for the distribution of such programs to the other stations on its network. Sustaining programs may be accepted or rejected at will by the stations affiliated with the networks. (NBC R. 75–76; CBS R. 95–96.)

NBC and CBS have basically comparable arrangements for compensating their affiliates for carrying network commercial programs. Stated in simplified terms, NBC and CBS affiliation contracts establish a rate for each affiliated station which is charged to the advertiser for the use of that station's time;[25] a portion of the receipts from the advertiser is turned over to the station, and a portion retained by the networks[26] (NBC R. 76–78; CBS R. 96–98; Tr. 1757, Exh. 279, 280).

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[25] The rates charged advertisers for particular stations range from $120 per evening hour for the smaller stations to $1,200 for the "key" stations in New York (NBC R. 77–79; CBS R. 97–99; Tr. 1726–27, 1949).

[26] Stations are remunerated according to a formula based upon the station rate paid by the advertiser. In the case of NBC, for the first 16 "unit hours" of network commercial programs during each 28-day accounting period, a station receives no compensation; for the next 25 "unit hours" it receives 20% of the station rate; for the next 25 "unit hours", 30%; and thereafter 37½%. A "unit hour" is equivalent to one evening hour or two daytime hours, and a Sunday afternoon hour counts as ¾ of a unit hour (NBC R. 76–77; CBS R. 96–97; Tr. 1757).

The compensation arrangements between CBS and its affiliates are similar in principle although they differ rather markedly in detail (NBC R. 77–79; CBS R. 97–99).

The arrangements between Mutual and its affiliates differ from those between CBS or NBC and their affiliates. Mutual has no network rate cards for its stations similar to those of NBC or CBS; it charges advertisers for each station at a rate established by the station itself and over which Mutual has no control. Mutual, however, retains a commission on all proceeds from network programs to cover its overhead expenses, and remits the balance to the affiliates. (NBC R. 79; CBS R. 99; Tr. 4923–4, 4937, 5078.)

Of primary significance in this litigation are six contractual provisions, customarily included in the standard affiliation contract utilized by one or more of the networks, which the Commission found to be against the public interest. The nature and effects of these six provisions are described in the discussion of the regulations which follows.

3. THE CHAIN BROADCASTING REGULATIONS AND THE COMMISSION'S REASONS FOR THEIR ADOPTION

Underlying principles.—While numerous subsidiary problems of policy are necessarily involved, the Commission, in its Report and in its regulations, followed certain underlying principles and policies which are discussed in detail at pp. 46–52, *infra*.

First, that the individual station licensee is the only person responsible under the law for the operation of his station in the public interest.

This responsibility is inherent in the holding of a station license, and may not be divested or transferred to anyone else.[27]

Second, that the Commission is vested by Congress with the duty so to exercise its power as to bring about the widest and most effective use of radio in the public interest.[28]

Third, that such a degree of concentration of control over broadcasting as tends to narrow and restrict the channels of communication and expression or the sources of programs and which excludes important programs from the public is contrary to the public interest and that a free and efficient broadcasting service will best be furthered by a reasonable measure of competition in the broadcast field.[29]

The application of these principles to the facts disclosed by its investigation was the basic consideration of the Commission in formulating the chain broadcasting regulations.

a. *Regulation 3.101—Exclusivity of affiliation.*—Regulation 3.101 (*supra*, p. 5) declares a policy against clauses in affiliation contracts which prevent the affiliate of one network from broadcasting the programs of any other network. In cities where there are fewer than four stations—

[27] NBC R. 88, 97, 101, 102, 117; CBS R. 108, 117, 121, 122, 137.

[28] NBC R. 93, 98, 116–117; CBS R. 113, 118, 136–137.

[29] NBC R. 82–86, 88, 94, 97, 103, 108–109, 111, 118–119, 206, 207–208; CBS R. 102–106, 108, 114, 117, 123, 128–129, 131, 138–139; 25, 27.

the great majority of the cities—such clauses totally exclude the programs of one or more of the existing national networks. In cities with four stations, a new network would be excluded.[30] Each of the basic principles set forth above are violated by such clauses: the stations' freedom to select among available network programs is restricted and a large measure of control over its programs is thus transferred to the network; the public is deprived of opportunity to hear outstanding programs of excluded networks; the fullest use of the radio facilities in each community is prevented, and competition among networks and competition among stations for network service and network affiliation are restrained (NBC R. 71–72, 87–93; CBS R. 91–92, 107–113; Tr. 1854, 1865–6, 8522, 4989, 4921–2, 5477, 5493, Exh. 383, Tr. 5463.)

b. *Regulation 3.102—Territorial exclusivity.*—Regulation 3.102 (*supra*, pp. 5–6) deals with affiliation agreements which prohibit the network from furnishing programs to any other station in the service area of its regular affiliate. Insofar as these clauses merely prevent duplication of programs in the same area, they are unobjectionable. But they have a further effect; even when the

[30] For example, in cities where the Blue Network is excluded, listeners cannot hear the Metropolitan Opera, Lowell Thomas, Raymond Gram Swing, the Boston Symphony, the Town Hall Meeting of the Air, etc.

regular affiliate rejects the program offered by the network, other stations in the community are prevented from broadcasting it.[31] The inclusion of such clauses in contracts between an affiliate and a network, therefore, prevents *other* stations from making the fullest use of their facilities and restrains competition between the affiliate and other stations. Accordingly, Regulation 3.102 declares a policy against the inclusion in affiliation contracts of clauses having such effects (NBC R. 71–72, 93–~~of clauses having such effects. (NBC R. 71–72, 93–~~ 1965–6.)

c. *Regulation 3.103—Duration of affiliation contracts.*—NBC and CBS affiliation contracts commonly bind the station for a five-year period, but the network for only one year.[32] Over a period of five years, the suitability or caliber of the programs of a network may deteriorate, or the necessities of the station and community which it serves may be radically altered. Furthermore, the record shows that NBC and CBS adopted the five-year

[31] The territorial exclusivity arrangement between Mutual and the Don Lee Regional network bars any stations on the Pacific Coast except Don Lee affiliates from receiving Mutual programs, even though such other stations may not be within the service area of any Don Lee affiliate (NBC R. 114–115; CBS R. 134–135).

[32] Apparently NBC has recently abandoned its right to cancel on one year's notice. See Mr. Trammell's testimony in Hearings before S. Committee on Interstate Commerce on S. Res. 113, 77th Cong., p. 462.

term in order to restrain competition among networks and stations for affiliation (*infra*, p. 91). Thus the network was free to shift outlets after a year while the stations could not shift networks until after five years. Regulation 3.103 as originally adopted declared a policy which would prevent the affiliation of a station with a network under a contract for more than one year. After considering a petition for amendment of this regulation, requesting, among other things, affiliation contracts of two years' duration, the Commission, by its Supplemental Report of October 11, 1941, amended the regulation (*supra*, p. 6) to grant that request. (NBC R. 71, 95–98, 205–206; CBS R. 91, 115–118; 24–25; Tr. 2595–8, 1819–20, 1903, Exh. 277 Cl. 1, 278 Cl. 1, 279 Cl. 1, 280 Cl. 15, Tr. 3636–7, 3682–3, 5176.)

d. *Regulation 3.104—Option time.*—The CBS standard affiliation contract contains a provision which gives CBS an option, exercisable on 28 days' notice, on all the time of the station for network commercial programs. NBC affiliates west of Denver are subject to similar option clauses; other NBC affiliates are subject to option clauses which cover 8½ hours, including those between 8 and 11 p. m., which are the best hours for broadcasting purposes. (NBC R. 73; CBS R. 93; Tr. Exh. 277 Cl. 1, Tr. 3602, Exh. 278, 279, 280, 282 Cl. 2, Tr. 3457, 1723, 1800, 3632, 3656–7, Exh. 124 Cl. III.)

These option-time provisions have substantially the same effect in respect of network programs

and competition as the network exclusivity clauses, since the option clauses preclude the affiliates from contracting for any programs of a competing network (within the hours covered by the option) except subject to removal or cancellation should the option be exercised. But the option-time provisions have further restrictive effects which exclusivity does not have, for the option-time provisions can be utilized not only to remove or cancel the programs already contracted for with another network, but also to remove *any* program already scheduled, including local and national non-network programs. Events of local public importance can be planned only subject to the networks requiring their cancellation on 28 days' notice. The further result is that no network affiliate can give a local advertiser a firm commitment for the use of the station's time (within the hours covered by the option) for more than 28 days in advance. The typical option-time clause, accordingly, like the exclusivity clauses, violates each of the basic principles stated heretofore. (NBC R. 72–73, 98–101; CBS R. 92–93, 118–121; Tr., Exh. 670, 665.)

For these reasons, Regulation 3.104 as originally adopted declared a policy against the inclusion of any option-time provision whatever in affiliation contracts. Following consideration of the petition for amendments (*supra*, pp. 13–14), substantial changes were made in this regulation by the Supple-

mental Report (NBC R. 206–211; CBS R. 25–29). Under the amended regulation (see *supra*. pp. 6–7), the broadcast day is divided into three segments, and at least two hours in each segment must be excluded from network option time.[33] It should be noted that even with respect to these hours the regulation does not prevent the *sale* of time to the networks for a program or series of programs. In respect of the hours which may be placed under network option, the Commission sought further to stabilize non-network programs by requiring that network options be exercised on not less than 56 days' notice—double the period contained in current affiliation contracts. In order to prevent these options from restraining network competition, it was further provided that they may not be utilized by one network to remove or cancel programs previously accepted from another network. The Commission found that this arrangement does not materially diminish the usefulness of the option to networks for time-clearance purposes, and at the same time opens the field for competition among network programs (NBC R. 206–211; CBS R. 25–29).

e. *Regulation 3.105—Station rejection of network programs.*—Under present contracts, NBC and CBS affiliates may reject a network commer-

[33] These segments are 8 a. m. to 1 p. m., 1 to 6 p. m., and 6 to 11 p. m.

The hours from 8 a. m. to 11 p. m. comprise what is commonly known as the broadcast day. From 11 p. m. to 8 a. m. three hours may be placed under option.

cial program offered to them for broadcast during the time covered by the network option only if it would be against the public interest to broadcast the program, or if the affiliate desires to substitute a local sustaining program of outstanding importance. With these exceptions, the station licensee is obligated to accept and broadcast the network commercial program, regardless of how it may fit into the station's general program schedule, or of the extent to which it meets the needs of the public which the station serves, or regardless of the fact that a better program may be available at that hour. (NBC R. 74–75, 101–102; CBS R. 94–95, 121–122; Tr. 1795, 1848, 1849, 5132, 1986–8, 5121, 3661, Exh. 124 cl. III, 133, 282 cl. 2, 386.)

Regulation 3.105 (*supra*, pp. 7–8) is a declaration that the licensee must reserve to himself the final responsibility for his programs. The rule declares a policy against affiliation contracts which prevent the station from rejecting network programs offered to it which the station *reasonably believes* to be unsatisfactory or unsuitable. In respect of network programs for which the station has already contracted, the regulation declares a policy against contracts which prevent the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance (NBC R. 74–75; CBS R. 94–95.)

f. *Regulation 3.106—Network operation of stations.*—At the time of the Report, NBC and CBS were the licensees of 18 important and powerful stations in the leading radio markets (*supra,* pp. 18, 20, 22).[34] Operation of stations by networks renders those stations permanently inaccessible to other networks, and in communities where the radio facilities are limited, may operate as a serious restraint upon competition. These considerations are especially applicable where a single network organization operates *two* stations in a single city, as did NBC in New York, Washington, Chicago, and San Francisco at the time of the Commission's Report.[35] Accordingly, Regulation 3.106 (*supra,* p. 8) declares a policy against licensing stations to networks in localities where the existing stations are so few, or of such unequal desirability, that network operation of a station would restrain competition by tending to exclude other networks from the locality; it also declares a policy against licensing more than one station to a network organization in any

[34] On December 23, 1941, the Commission granted the application of NBC for assignment of one of its stations—WMAL in Washington, D. C.—to M. A. Leese Radio Corporation, and for assignment of three of its stations—KGO, WJZ, and WENR—to Radio Corporation of America (NBC R. 366–367). These latter three stations are now licensed to the Blue Network, Inc.

[35] This dual operation is related to NBC's operation of two networks, dealt with in the discussion of Regulation 3.107, *infra,* pp. 34–35.

community. (NBC R. 51–52, 59–60, 102–105; CBS R. 71–72, 79–80, 122–125; Tr. 2030, 1042, 2791–2, 3024, Exh. 274A, 240A.)

g. Regulation 3.107—Operation of more than one network by a single network organization.—Regulation 3.107 (*supra*, pp. 8–9), now suspended, declared a policy against the affiliation of stations with a network organization which operates more than one network. Of the four national networks furnishing programs to the listening public, two, at the time of the Commission's Report, were controlled and operated by NBC. The Commission, including the minority members, found this undesirable. (NBC R. 80–81, 106–109, 162–163, 174; CBS R. 100–101, 126–129, 182-183, 194; Tr. 1042, 1389, 2560–5, 1899, 2373–6, 2188–97, 1923).

The hearing disclosed that NBC's ownership of two networks operated as a buffer against competition from other networks. In several cities where NBC had two outlets—one for the Red and one for the Blue—at least one of the other networks had no outlet at all. Thus there was a restraint not only upon existing networks, but upon any new network which might be formed. In such cities, two of the stations in the city were obtaining their network program service from the same organization. This tended to produce uniformity in program policies, and to exclude new and independent voices from the air. Fur-

thermore, these circumstances tended to produce an undue centralization of control over radio programming.

In its Supplemental Report of October 11, 1941, the Commission reaffirmed the policy embodied in the regulation but it found that there was such unanimity of opinion concerning the desirability of separating the two networks that the separation might be expected to occur voluntarily. (NBC R. 211–212; CBS R. 29–31). Furthermore, the Commission found it desirable to move with caution where the sale of properties of public importance was involved. Accordingly, the regulation was suspended indefinitely and provision was made for adequate notice (a minimum of six months) before it may be subsequently invoked.[35] As we have pointed out above (*supra*, note 7, p. 10), NBC subsequently transferred the Blue Network to a separate corporation owned by its parent, Radio Corporation of America.

h. *Regulation 3.108—Network control of station rates.*—A provision, included only in NBC's contracts, deters its affiliates from setting a lower

[35] Subsequently, the Commission declared that it would observe a similar suspension with respect to that portion of Regulation 3.106 which prevents the operation of two stations in any community by a single network organization, if it could be shown that such operation was indispensable to the continued operation of two networks by a single network organization. See the Minute adopted by the Commission on October 31, 1941 (NBC R. 392; CBS R. 473).

rate for non-network national advertising than the network card rate for the station (NBC R. 79–80, 109–111; CBS R. 99–100; 129–131; Tr. Exh. 133). The record shows that the effect of this provision is to protect network broadcasting from the competitive incursions of transcription broadcasting. At the Commission's hearings the witnesses for NBC frankly conceded that the purpose of this provision was to prevent its affiliates from competing with the network for national advertising (*infra*, p. 114).

Regulation 3.108 (*supra*, p. 9) declares a policy against the inclusion of such clauses in affiliation contracts. NBC has already eliminated this provision from its contracts,[37] and inasmuch as CBS and Mutual never had it, this regulation will operate merely as a bar to the inclusion of such provisions in the future.

SUMMARY OF ARGUMENT

I

A. The Commission has statutory authority to adopt the chain broadcasting regulations under Sections 307 (a) and 309 (a) of the Communications Act which empower the Commission to determine whether the grant or renewal of a station license will serve the "public convenience, interest,

[37] See the testimony of Niles Trammell, NBC president, in Hearings before S. Committee on Interstate Commerce on S. Res. 113, 77th Cong., p. 462.

or necessity" and under Section 303 (i) of the Act which gives the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting." The plain language of these provisions authorizes the regulations in question. And the regulations properly apply the statutory standard of the "public convenience, interest, or necessity." That standard authorizes the Commission, in exercising its licensing powers under Sections 307 (a) and 309 (a) and its power to adopt regulations under Section 303 (i), to consider the fact that the licensee applicants operate under arrangements which transfer to others the responsibility for the operation of their stations, which prevent them from making the fullest use of broadcast facilities, which restrict competition among licensees, and which tend to produce an undue concentration of control over broadcasting service.

1. The regulations embody the principle of the Communications Act that the station licensee shall exercise full and final responsibility for the operation of his station and shall not, voluntarily or involuntarily, transfer this responsibility to others. The principle of licensee responsibility is established by Section 301 of the Act which provides that persons operating radio transmission facilities must be licensed; by Section 308 which provides that applications for licenses shall set forth certain facts concerning the qualifications of

the applicant; and by Sections 309 (b) (2) and 310 (b) which forbid the transfer of licenses without Commission approval. The Commission has always enforced the principle of licensee responsibility, recognizing that it is an essential means of preventing evasion of the fundamental requirements of the Act that licenses be issued only to qualified persons upon a showing that they will operate in the public interest and that there should be no undue concentration of control over broadcasting. The investigation on which the instant regulations are based disclosed that the contractual provisions and the practices proscribed in the network regulations unduly restrict the control of licensees over the operation of their stations.

2. The regulations embody the principle of the Communications Act that radio facilities shall be used as fully and effectively as possible in the public interest. The natural limitation on the number of available radio frequencies emphasizes the importance of preserving the maximum use of facilities. The statement in Section 1 that the general objective of the Act is to make available to all the people of the United States a rapid and efficient nation-wide radio service, and the provisions of Section 303 (g) that the Commission shall encourage the larger and more effective use of radio in the public interest clearly indicate that the term "public interest" refers to the interest

of the listening public in the fullest use of radio facilities. The investigation on which the instant regulations are based disclosed that certain restrictive provisions of network affiliation contracts, such as exclusivity, option time, and long term affiliation contracts, improperly limit the ability of licensees to make the fullest and most effective use of the facilities assigned to them.

3. The regulations serve to encourage competition and prevent undue concentration of control in the radio industry. The Commission found that the proscribed provisions of the network affiliation contracts adversely affected the public interest by stifling competition and by creating too concentrated a control of broadcasting in the hands of NBC and CBS.

In forbidding the contractual provisions in question, however, the Commission did not undertake to apply the antitrust laws as such but rather to consider competition as a factor related to the operation of stations in accordance with the standard of the "public convenience, interest or necessity." Appellants' contention that the Commission may not in the exercise of its licensing powers take these matters into account is erroneous in view of the provisions of the Act, its legislative history and administrative construction, and the relevant judicial authorities.

B. The Commission properly embodied its policies in general regulations. Such regulations are authorized in four different places in the Com-

nunications Act—Sections 4 (i) and 303 (f), (i) and (r). Further, the Commission's action constitutes a recognition of the desirability of declaring in the form of general regulations policies designed to guide future administrative action. See *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. 8, 77th Cong., 1st Sess., page 27, and compare *Securities and Exchange Commission* v. *Chenery Corp.*, No. 254, this term, decided Feb. 1, 1943. There is no basis for appellants' suggestion that the regulations are "iron-bound" and constitute an abdication by the Commission of all discretion. Each applicant is entitled to a hearing in which he may show that the policies embodied in the regulations are not appropriate in his particular situation.

II

The facts developed in the administrative record and embodied in the Commission's report make it clear that the regulations have a rational basis, and are not arbitrary and capricious. There is no dispute as to the existence or nature of the underlying facts on the basis of which the Commission found the practices condemned by the regulations to be contrary to the public interest. The claims of CBS and NBC that the application of the regulations would make impossible, or seriously hamper, chain broadcasting operation are without foundation; for network operations have been in the past, and are

now being successfully conducted without recourse to most of the contractual restrictions forbidden by the regulations.

III

The Communications Act, construed as conferring upon the Commission the power to issue the regulations in question, does not delegate legislative power to the Commission in violation of the Constitution. This Court has repeatedly pointed out that the Communications Act and its predecessor, the Radio Act of 1927, declare a policy and establish standards which meet the constitutional requirement. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428; *Schechter Corp.* v. *United States*, 295 U. S. 495, 540; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137–138.

The regulations do not constitute censorship or an abridgment of freedom of speech. They are not concerned with program content and do not regulate what may or may not be said on the air. Even if the regulations have an indirect effect on what programs are broadcast, they do not abridge freedom of speech since one of their very purposes is to enlarge the opportunity of access to the radio audience. The mere fact that the industry to be regulated is engaged in the dissemination of news and ideas does not constitute such

regulation a denial of free speech (*Associated Press* v. *National Labor Relations Board*, 301 U. S. 103); nor does the fact that the sanction for breach of the regulations is denial of license imply a denial of free speech, since the natural limitation of the radio spectrum necessitates the licensing system, which has been sustained by this Court. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266.

IV

In holding that the regulations are valid the court below properly decided this issue on the basis of the administrative record, the pleadings and the motions, without granting a trial *de novo*. It is well established that where adequate administrative hearings are afforded, the reviewing court will not receive additional evidence. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426. Such hearings were in fact afforded by the Commission. Adequate notice was given of the issues as to which the Commission desired information and as to which official action was finally taken. And the networks were afforded a full opportunity to present all relevant information. Indeed, the controversy does not concern the primary facts giving rise to the litigation, but rather the ultimate issue as to the effect of the regulations and their wisdom. Appellants had full opportunity to present evi-

dence and argument on these issues in the administrative proceeding.

ARGUMENT

Appellants challenge the validity of the Commission's chain broadcasting regulations on three grounds. First, they deny that the Communications Act gives the Commission authority to adopt the regulations. Second, they contend that the regulations are arbitrary and capricious. Third, they urge that if the Act confers power to adopt the regulations, it unconstitutionally delegates legislative power, and abridges freedom of speech in violation of the First Amendment. Finally, appellants contend that the district court erred in granting the Government's motion for summary judgment. We will take these points up in order.

I

THE COMMUNICATIONS ACT AUTHORIZES THE COMMISSION TO ADOPT THE INSTANT REGULATIONS

By Sections 307 (a) and 309 (a) of the Communications Act of 1934 Congress has delegated to the Commission the task of determining whether the grant or renewal of a station license will serve "public convenience, interest, or necessity." And by Section 303 (i) of that Act, the Commission is authorized "as public convenience, interest, or necessity requires * * * to make special regulations applicable to radio stations engaged in chain

broadcasting." The regulations here attacked were issued pursuant to the authority thus delegated to the Commission.

Appellants challenge the authority to issue these regulations on two grounds; first, as a substantive matter, they deny the Commission's power under either Section 303 (i), or Sections 307 (a) and 309 (a), or both, to prescribe substantive norms of the character here promulgated, and second, as a formal matter; they deny the Commission's authority to impose these standards by regulations rather than by specific orders on applications for licenses or renewals. We submit that neither contention is valid.

The regulations here attacked are "regulations applicable to radio stations engaged in chain broadcasting." Accordingly they are expressly authorized by Section 303 (i), which is plain and unambiguous. Failing any ambiguity in this provision, appellants must sustain the heavy burden of evolving from the statute's context or legislative history implied limitations which negative the Commission's authority.

The only limitations contained in the statute on regulations is that they be in the "public convenience, interest, or necessity." We submit that the standard of "public convenience, interest, or necessity" which is given significance "by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services,"

and by the general objectives of the statute,[28] comprehends the principles which the regulations are intended to implement; i. e., that in exercising its licensing powers under Sections 307 (a) and 309 (a) and its power to adopt regulations under 303 (i), the Commission may take into consideration the fact that a licensee is operating under arrangements or circumstances which transfer to someone else the responsibility for operation of his station; or that he is operating under arrangements which prevent him or other licensees from making the fullest use of broadcasting facilities in the interest of his listening public; or that he is operating under arrangements which restrict competition between him and other licensees and tend to produce an undue concentration of control over broadcasting service.

Although the relevance of each of these principles to the standards by which the Commission must be guided will be discussed separately, it should be noted that they are not mutually exclusive or wholly distinct. The avoidance of concentration of control of broadcasting and the preservation of full opportunity for free expression of viewpoints—which, as will be seen, are cardinal objectives of the Communications Act—are related alike to the principles of licensee responsibility, to that of competition and to that of maximum use of facilities. The principles as here applied reflect a coherent legislative pattern.

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[28] *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285.

A. THE COMMUNICATION ACT OF 1934 AUTHORIZES THE COMMISSION TO PRESCRIBE THE STANDARDS CONTAINED IN THE REGULATIONS.

1. *Licensee responsibility*

The requirement that the station licensee shall exercise full and final responsibility for the operation of his broadcasting station, and that he shall not divest himself, voluntarily or involuntarily, of such responsibility or of the practical measure of control necessary to fulfill it, is a basic feature of the Communications Act. So far as we know, it has never heretofore been questioned; as a matter of administrative practice, the Commission has always adhered to it.

Section 301 of the Act states it to be a purpose of the Act "to provide for the use" of the radio channels "by persons for limited periods of time, under licenses granted by Federal authority." The same section prohibits the *use* or operation of any radio transmission facility by any person except "with a license in that behalf" granted pursuant to the Act. Section 308 provides that applications for licenses shall set forth certain facts concerning the qualifications *of the applicant* to operate the station.

In order to make certain that the licensee shall maintain control of, and continue to assume responsibility for, the operation of his station, Section 309 (b) (2) requires that every license shall contain a statement that neither the license *nor the*

right granted thereunder shall be assigned or otherwise transferred in violation of the Act. And Section 310 (b) prohibits the voluntary or involuntary transfer of a license or of "the frequencies authorized to be used by the licensee, and the rights therein granted," or the transfer of control of a licensee corporation, unless the Commission decides, on the basis of full information, that the transfer is in the public interest and so signifies in writing.

In passing upon individual cases which have come before it, the Commission has repeatedly emphasized that it is the station licensee who is responsible for the conduct of the station and for its operation in the public interest, and has ruled that this responsibility may not be delegated, whether by contract or otherwise, to another.[39] That the principle of licensee responsibility is thus an integral part of the Act's policy and necessarily a relevant standard in determining whether given

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[39] *Replogle*, 1 F. C. C. 256 (1935); *Cole*, 2 F. C. C. 541, 542 (1936); *WCBD, Inc.*, 3 F. C. C. 467, 472 (1936); *Stump*, 3 F. C. C. 560, 564 (1936); *Porter & Eversole*, 4 F. C. C. 680, 682 (1937); *Radio Enterprises, Inc.*, 7 F. C. C. 169 (1939); *Bellingham Broadcasting Co.* (Docket No. 5478, July 18, 1940), 8 F. C. C. —; *Westinghouse Electric & Manufacturing Co.* (Docket Nos. 5823–5826, September 4, 1940), 8 F. C. C. —; *Voice of Brooklyn, Inc.* (Docket No. 1967, October 16, 1940), 8 F. C. C. —; *General Electric Company* (Docket No. 5822, October 22, 1942), 8 F. C. C. —; *Metropolitan Broadcasting Corp.* (Docket No. 4050, June 18, 1941), 8 F. C. C. —.

practices serve the "public convenience, interest, or necessity" can therefore hardly be questioned.

Applying this principle of licensee responsibility to the facts disclosed by its investigation, the Commission concluded that affiliation contracts which bind a station licensee to one network for five years and prevent it from utilizing the programs of other networks go too far in tying the licensee's hands with respect to the sources of program material (NBC R. 95–98; CBS R. 115–118). Similarly, the Commission found that options by which networks can require a licensee to remove any other program to make way for a network commercial program tend unduly to restrict the licensee's freedom with respect to the scheduling of local programs or those of other networks (NBC R. 98–101; CBS R. 118–121).

2. *Maximum use of facilities*

"The number of available radio frequencies is limited" [40] by natural laws. The existence of these physical limitations makes it necessary for the Government to license radio broadcasting. These limitations make waste a public evil; persons who operate radio broadcasting stations must, to fulfill their responsibility, make the best possible use of their stations in order that there may be the maximum

[40] See *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474.

effective use of the limited radio broadcasting spectrum in the interest of the public." "The Commission is an administrative agency set up by Congress to determine under statutory direction the rights of the people of the United States to have the best possible radio service." [41]

The general objective of the Communications Act, as stated in Section 1 thereof, is "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service." This provision is supplemented by Section 303 (g) which provides that the Commission shall "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." Thus the term "public interest" clearly refers at least to the interest of the listening public in the fullest and most effective utilization of radio facilities.

Pursuant to this principle, the Commission has long required stations to utilize the best available physical facilities appropriate to their operation. Thus, the Commission prescribes minimum hours

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[41] See Second Annual Report, Federal Radio Commission (1928), pp. 169–170, quoted in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138–139.

[42] *Black River Valley Broadcasts, Inc.* v. *McNinch*, 101 F. (2d) 235, 237 (App. D. C.), certiorari denied 307 U. S. 623.

during which a licensee must maintain program service; it has frequently prescribed the use of power in excess of that requested by an applicant; and it has closely supervised the design of antennae and the selection of antenna sites; all with a view to securing maximum service."[4]

Applying the same principle here, the Commission concluded that certain provisions of network affiliation contracts improperly limit the ability of licensees to make the fullest and most effective use, in the public interest, of the radio facilities assigned to them. As stated in the Commission's Report (NBC R. 117; CBS R. 137):

> Time options adversely affect the ability of licensees to serve the local needs of their communities for program and advertising service. Artificial limitations on the price which licensees may charge national advertisers hamper licensees' efforts to render the best possible program service. * * * Exclusivity provisions which prevent affiliates from carrying the programs of other networks and which prevent any other station within the "territory" of the affiliate from

[4] When CBS acquired exclusive rights to erect transmitting antennae for frequency modulation (FM) broadcasting on Mt. Wilson—by far the best such antenna site in southern California—the Commission required it, as a condition to the grant of a license, to eliminate the exclusive feature of its lease so that others might have opportunity to share in the benefits of the site. *Columbia Broadcasting System, Inc.*, File No. B5-PH-94, July 16, 1941.

obtaining programs from the latter's network, deprive many listeners of the opportunity to hear certain worth-while programs. Long-term affiliation contracts prevent the licensees from bargaining at reasonable intervals for the best network programs.

Such practices whittle away the ability of the licensee to render the best practicable service as effectively as interference with the physical process of transmission."

3. *Preservation of competition and prevention of concentration of control*

The Commission found that the public interest was adversely affected by the curtailment of competition which existing affiliation contracts entail. If found that these contracts have stifled competition among stations for network affiliation and have prevented the benefits to themselves and to the public which would result from a wider and freer choice among network and non-network programs. Similarly, it found that these contractual restraints, together with direct operation by networks of too many stations and with dual network operation by NBC, have resulted in an undue concentration of control in the hands of NBC and CBS over broadcasting, which tends to restrict the opportunities for expression of varying viewpoints and the potential number and variety of program sources. The effect has been, the Commission concluded, to maintain broadcasting at a lower level of public benefit than might be attained under a more fully competi-

tive system with a more substantial degree of control exercised by the licensees themselves.

The appellants apparently do not question the Commission's conclusion that existing network practices impair competition, but contend that the Commission may not take any account of such consequences. It is our position that the Act, its legislative history and long-established administrative construction, and judicial decisions, make clear that the Commission may take into account, in exercising its licensing authority, the preservation of competition and prevention of monopolistic domination of radio broadcasting.

a. *The Act and its Legislative History.*—Section 303 (i) of the Communications Act authorizes the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting." Appellants contend (NBC Br. 63–72; CBS Br. 24–34) that the power conferred by this section must be construed as applying only to the technical matters of radio transmission." In this connection they refer to statements made in the course

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" It is not true as appellants suggest, however (NBC Br. 63–66; CBS Br. 24–26), that the other subsections of Section 303 all relate to technical matters. For example, Section 303 (a) authorizes the Commission to classify radio stations. Section 303 (b) gives the Commission the power to prescribe the nature of the service to be rendered by each class of station and each station within a class. By Section 303 (j) the Commission is given authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable. In addition, Section 303 (g), which appeared for the first time in the Communi-

of the debates to show that the problem which concerned the legislators was that the Commission should guard against monopoly of the air resulting from larger stations drowning out smaller ones. This recognition that the Commission has power to guard against monopoly accomplished by technical means tends to disprove rather than prove appellants' point. It is difficult to believe that Congress would have taken pains to prevent monopoly through the use of technical devices while at the same time granted no power to check monopoly accomplished through business arrangements. Certainly there is nothing in the Act to support such a distinction. Monopoly created by lawyers and businessmen is as detrimental to the public interest as monopoly created by radio engineers. Obviously, when Congress concerned itself with monopoly, it concerned itself with the whole problem and not with a single facet.

Moreover, there is no basis for appellants' contention that the legislative history indicates that

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cations Act of 1934, authorizes the Commission to study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest. As the court below stated (NBC R. 524-525; CBS R. 486):

"We can see no reason for confining the last clause [of Section 303 (g)] to scientific or engineering problems; the purpose is apparent to give the Commission power to foster the industry in all appropriate ways. It is not clear that this was a new purpose; but if it was, it infused the powers already granted in an earlier act, broadening them in accord with a changed outlook—the power granted under subdivision 'i' among the rest."

Congress was concerned *only* with "monopoly" resulting from electrical interference. In fact, the contrary is true.

The provision which is now Section 303 (i) was carried over verbatim from Section 4 (h) of the Radio Act of 1927. There it first appeared as a Senate Committee amendment to the House bill (H. R. 9971, 69th Cong.) which became the 1927 Act. It then read:

> (C) the commission, from time to time, as public convenience, interest, or necessity requires, shall * * *
>
> * * * * * *
>
> (j) When stations are connected by wire for chain broadcasting, determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, *and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting.* [Italics supplied.]

The report of the Senate Committe on Interstate Commerce (Report No. 772, 69th Cong., 1st sess., p. 3) stated that under this bill:

> The commission * * * is given complete authority—
>
> * * * * * *
>
> (j) to control chain broadcasting.

The bill passed the Senate in this form. The conference committee revised the section and re-

ported it back in the more general and flexible form in which it now appears."[15]

As the court below pointed out in its opinion (NBC R. 524; CBS R. 485–486), it would be altogether unwarranted to assume that the general form of the section as finally enacted was intended to adopt only the first clause of subsection (j) which authorized the Commission to determine the power and wave lengths of stations engaged in chain broadcasting, and abandon the second clause which authorized the Commission to make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting.[16]

That Section 303 (i) is not limited to technical matters, but comprehends other forms of regulation directed to the problems of monopoly, is apparent as well from the Senate debates on the conference report on the 1927 bill, where the following

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[15] The conference reports contain no explanation for the change in form, but merely state that the jurisdiction conferred by Section 4 as revised is substantially the same as the jurisdiction conferred upon the Commission by Section 1 (C) of the bill as amended in the Senate. See S. Doc. 200, 69th Cong., 2d sess., p. 17; H. Rept. 1886, 69th Cong., 2d sess., p. 17.

[16] The position taken by the appellants is essentially that, in applying the public interest standard, the Commission is limited to considering physical and technical matters, and perhaps the "moral" and financial qualifications and prior experience of applicants. They construe Section 303 (i) as empowering the Commission to regulate only the engineering aspects of chain broadcasting operations by stations. As a corollary, the appellants dismiss matters pertaining to

illuminating colloquy took place (68 Cong. Rec. 2881):

> Mr. BROUSSARD. * * * I received this morning a telegram from Shreveport, La., signed by Mr. W. K. Henderson, who is a very wealthy man there, and who has a broadcasting station which he uses mostly to entertain his friends and to accommodate the public. I do not think he is making anything out of it. His telegram reads:
>
> SHREVEPORT, LA., *January 31, 1927.*
> Hon. EDWIN S. BROUSSARD,
> *United States Senate*:
>
> Our Shreveport Times this morning carried headlines of 35 stations to be chained together. Just as I wired you the other day, chain stations will monopolize and independent stations, such as we have at Shreveport, are practically done for. Hope you will give bill considerable study

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competition or concentration of control as outside the Commission's ken.

As we have noted (*supra*, note 44), the other subdivisions of Section 303 are not limited to technical matters. And the view thus urged sits uneasily beside this Court's pronouncements that the Communications Act is a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out the legislative policy," that Congress moved under the "spur of a widespread fear" of monopolistic domination of broadcasting and sought to maintain "a grip on the dynamic aspects of radio transmission," and that the broadcasting field is one "of free competition." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137; *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474.

and stand for interest of others beyond Radio Corporation of America who control chain stations. Between American Telephone & Telegraph Co. and Radio Corporation of America and other interests the independents are through.

W. K. HENDERSON,
Owner, Radio Station KWKH.

I should like to have the Senator from Washington cover the suggestion contained in telegram, and if the bill does actually make this impossible, to make that known to the Senate.

MR DILL. I am very glad the Senator from Louisiana has asked the question. It gives me an opportunity to explain not only that but some things regarding what the Senator from Nevada said.

In the first place, under this bill chain broadcasting today, concerning which the writer of the telegram is concerned, is absolutely without any regulation. We have no law today to handle the situation, and the various radio organizations, including the Radio Corporation of America and the American Telephone & Telegraph Company, are going ahead and building up the chain stations as they desire without let or hindrance and without any restrictions, because the Secretary of Commerce has no power to interfere with them. Unless this proposed legislation shall be enacted they will continue to do so, and they will be able by chain-broadcasting methods practically to obliterate the

independent small stations, as the man who wrote the telegram suggests.

While the commission would have the power under the general terms of the bill, the bill specifically sets out as one of the special powers of the commission the right to make specific regulations for governing chain broadcasting. As to creating a monopoly of radio in this country, let me say that this bill absolutely protects the public, so far as it can protect them, by giving the commission full power to refuse a license to anyone who it believes will not serve the public interest, convenience, or necessity. It specifically provides that any corporation guilty of monopoly shall not only not receive a license but that its license may be revoked; and if after a corporation has received its license for a period of three years it is then discovered and found to be guilty of monopoly, its license will be revoked.

In addition to that——

Mr. HEFLIN. Mr. President——

Mr. DILL. Just a moment. In addition to that, the bill contains a provision that no license may be transferred from one owner to another without the written consent of the commission, and the commission, of course, having the power to protect against a monopoly, must give such protection.

I wish to state further that the only way by which monopolies in the radio business can secure control of radio here, even for a limited period of time, will be by the commission becoming servile to them. Power

> must be lodged somewhere, and I myself am unwilling to assume in advance that the commission proposed to be created will be servile to the desires and demands of great corporations of this country.

Senator Dill was in charge of the bill in the Senate and his remarks were addressed to the chain broadcasting provision in its final form. In the excerpt quoted above, he makes several points worthy of note:

(1) That the Commission could regulate chain broadcasting under its general powers even without this specific authorization.

(2) That the Commission was, however, given the power "to make specific regulations for governing chain broadcasting."

(3) That the Commission was expected to use its powers so as to protect the public against monopolies.

Thus, the Congressional intent is clear. It was specifically contemplated that, while the enforcement of the antitrust laws was not vested in the Commission, the Commission would, in exercising its powers, take into consideration the policy of those laws; and authority to regulate chain broadcasting was given to the Commission with this end consciously in mind.[47]

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[47] In an attempt to rebut the clear statement by Senator Dill, which is quoted in the text, both NBC (Br. 77) and CBS (Br. 67) rely upon a colloquy between Senators Dill

The appellants urge (NBC Br. 45–56; CBS Br. 55–61) that since Congress in Section 311 of the Communications Act expressly authorized the Commission to refuse licenses to persons who have been convicted of violating the antitrust laws, it by implication deprived the Commission of any jurisdiction to consider questions pertaining to competition or monopoly in exercising its licensing powers unless the applicant has already been found guilty by a court of violating the antitrust laws. This contention misapprehends the function of the Commission in administering the Communications Act. The Commission does not apply the antitrust laws as such. Rather, as it stated in its Report (NBC R. 82; CBS R. 102):

> The prohibitions of the Sherman Act apply to broadcasting. [And] This Commis-

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and Pittman which occurred two days later and which appears at 68 Cong. Rec. 3034. However, the excerpt which they quote has been torn from its context. When read in context, it is apparent that the Senators were discussing the Commission's powers and sanctions for preventing discrimination in the allocation of radio time to candidates for office. The discussion must be read in the light of the fact that at that time Section 14 of the Bill (which ultimately became Section 14 of the Radio Act of 1927) recognized the supposed jurisdiction [but *cf. Sta-Shine Products Co. v. Station WGBB*, 188 I. C. C. 271] of the Interstate Commerce Commission to hear and determine complaints of discriminatory or unreasonable practices by broadcasters. That the Radio Commission was not foreclosed from considering such matters in the exercise of its licensing power, however, is apparent from the observations of Senator Dill almost immediately after the colloquy cited by appellants (68 Cong. Rec. 3035–3036).

sion, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve.

In the Sherman Act, as well as in a number of other statutes [15] Congress has established a policy of discouraging monopoly and fostering free and fair competition in economic activity generally. Radio broadcasting is within the ambit of the antitrust laws and is therefore subject to the standards and sanctions which they prescribe. But the fact that Congress has made available judicial sanctions for the effectuation of the policy of fostering free and fair competition, as it is embodied in other legislation, in no way detracts from the Commission's duty under the Communications Act to consider that policy in exercising its power to grant licenses or promulgate regulations in accordance with the "public interest, convenience, or necessity." Cf. *United States* v. *Lowden*, 308 U. S. 225; *Interstate Commerce Commission* v. *Railway Labor Executives Assn.*, 315 U. S. 373. On the contrary the Commission is obliged, in giving substance to the standard of "public convenience, interest, or necessity," to be guided by congressional policy with respect to fostering competition so far as it is applicable to

[15] See e. g. Federal Trade Commission Act, 38 Stat. 717, 52 Stat. 111, 15 U. S. C. 45, et seq.; Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13 et seq.

the subject matter within the Commission's jurisdiction. Cf. *United States* v. *Lowden*, 308 U. S. 225; *Interstate Commerce Commission* v. *Railway Labor Executives Assn.*, 315 U. S. 373.

Here, by Sections 311 and 313 Congress went out of its way specifically to make the antitrust laws applicable to the radio broadcasting industry. Examination of the Act as a whole further points to the congressional intention that the requirement of free competition be applied in the radio field. In Section 3 (h) of the Act, Congress provided that persons engaged in radio broadcasting shall not be deemed common carriers. By Section 313 it explicitly made the antitrust laws applicable to persons engaged in radio communication, and authorized the courts to revoke the license of any person found guilty of violating the antitrust laws. In Section 311 it directed the Commission to refuse a license to any person whose license has been revoked by a court under Section 313, and authorized the Commission to refuse a license to any person found guilty by a federal court of having violated the antitrust laws with respect to radio communications. By section 314 it forbade persons engaged in radio communications from engaging in communication by wire, or vice versa, if the effect thereof will be substantially to lessen competition or to restrain commerce. These elaborate provisions leave no doubt that Congress intended to adopt the policy

of free competition for the radio broadcasting industry.

Yet appellants urge that the fact that the Commission is thus authorized by the Communications Act itself to refuse to grant a license or a renewal to persons judicially found to have contravened that policy, as it is formulated in the antitrust laws, implies that in the absence of such judicial finding the Commission must give no consideration to the effects of monopoly or unduly restricted competition, in exercising its licensing and regulatory authority. Even the absence of that provision in the Act would leave grave doubt that Congress intended that the freedom from monopoly and unreasonable restraints on competition which pervades our legal norms should not be embodied in the conception of the "public interest" which must guide the Commission. Its presence, and the other provisions of the Act adverted to above, point to the opposite conclusion. Cf. *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35. At the very least, however, Section 311 which was designed to implement the Commission's licensing power (see *infra*, pp. 64–67) cannot, as appellants contend, be construed to limit that power.

Nor does the construction of the Act here urged render superfluous that portion of Section 311 which authorizes the Commission to refuse a license to a person who has been adjudged guilty of an antitrust law violation. The section, in

the form in which it was enacted in the Radio Act of 1927, was mandatory and directed the Commission to refuse a license to any person who had been adjudged guilty of an antitrust law violation in the radio field (Section 13 of the Radio Act of 1927). Under the Radio Act, accordingly, no argument of superfluity could have been made. The provision was amended to its present form when it was carried into the Communications Act in 1934." Senator Dill, the manager of the bill in the Senate, stated that the change "was one which was insisted upon by certain organizations, and it seemed fair to the committee to do that" (78 Cong. Rec. 8825). Obviously, it seemed fair because the antitrust

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" The Senate Committee report explained the change thus (S. Rept. 781, 73d Cong., 2d sess., p. 7):

"The effect of the alteration is to bring section 311 more closely into harmony with section 313. If the court revokes a license, the Commission should not grant an application for another license to the same parties. If, however, the court has adjudged the person guilty, but has not revoked the license, the Commission can determine whether or not public interest will be served by the granting of a license."

Thus the one change which has been made in the relevant portions of the Act since their adoption in 1927 was to increase the Commission's discretion as to what to do in the event of violation of the antitrust laws. And it was intended that the Commission should consider the violation from the standpoint of "whether or not public interest will be served by the granting of a license." Thus, again, the Commission was not to apply the antitrust laws as such, but was to consider particular violations of the antitrust laws as they had bearing upon the matters which were entrusted to the Commission.

law violation might conceivably bear no relation to the broadcasting operation. But certainly it cannot be seriously argued that in making this amendment in 1934 Congress intended to alter the entire theory of the 1927 Act by reading competition out of the public-interest standard.[80]

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[80] The specific grants of authority to the Commission contained in Sections 215 and 602 (d) of the Act (See CBS Br. 38; NBC Br. 50–51) with respect to competition among common carriers in no way negative the intent of Congress that the Commission should take into account the policy of the antitrust laws in exercising its licensing powers. Neither of these provisions was in the Radio Act of 1927. They appeared in the Communications Act of 1934 where for the first time the Commission was given jurisdiction over common carrier matters.

Section 215 directs the Commission to investigate: the transactions of common carriers relating to the furnishing of equipment, research services, finances, and personnel; the furnishing of telegraph services by telephone companies, and vice versa; and exclusive dealing contracts of common carriers. Section 602 (d) is an amendment to Section 11 of the Clayton Act which from the time of its enactment in 1914, authorized the Interstate Commerce Commission to enforce certain provisions of that Act with respect to common carriers. When, in 1934, jurisdiction over common carriers by wire and radio was transferred to the FCC, this section of the Clayton Act was amended to give the FCC power to enforce these provisions of the Clayton Act with respect to the carriers under its jurisdiction. Similar authority has been given to other governmental agencies.

The power of the Federal Communications Commission in acting on broadcast licenses, to consider matters pertaining to competition in applying the public-interest standard, was present in full force in the Radio Act of 1927, which gave the Radio Commission no common carrier functions whatsoever. Therefore, the Commission's specific authorization to con-

Section 311 in its present form serves, in the regulatory scheme which the Commission administers, to eliminate the necessity for retrying the antitrust suit in proceedings involving the issuance or revocation of licenses. It enables the Commission to accept as final and determined the facts pertaining to restraints on competition where a conviction has been obtained, without the necessity of establishing such facts or such restraints at its own hearing; the Commission's function is then to determine whether in view of those facts and the particular restraint as found by the court the public interest, convenience or necessity requires the grant (or denial) of a particular license application. As the court below pointed out (NBC R. 526–527; CBS R. 488):

> We construe this clause of sec. 311 as going no further than to provide the Commission with an estoppel as to any facts which a court may have found; these may be taken as data for any rational inference that can be drawn from them relevant to the ultimate issue; but "guilt" as "guilt" is not the ultimate issue. Certainly that is the only effect which it is necessary to give the clause; there is not the slightest

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sider matters relating to competition in connection with common carriers—which authorization was given to the Commission at the same time that it was given jurisdiction over common carrers—cannot detract from its general and previously existing power to consider competition in connection with its radio broadcast licensing function.

> warrant for inferring that in the absence of an adjudication, the Commission may not determine what has been an applicant's past conduct, or may not consider how far, if repeated, it would interfere with the fullest use of his license. Whatever may be the mysteries enveloping an adjudication of "guilt" under the Anti-Trust laws which make that issue unfit to be entrusted as such to profane hands, the Commission is certainly peculiarly competent to appraise the effect upon broadcasting of restrictive or monopolistic practices, and is as competent to decide whether an applicant is likely to engage in them as it is to decide any of the other issues which come before it.

Appellants (NBC Br. 58–62; CBS Br. 61–66) also seek to rely on the fact that various bills which preceded the Radio Act of 1927 proposed to empower the Secretary of Commerce to determine whether the antitrust laws were being violated, and if so, to refuse a license to the violator. They point out that Secretary Hoover opposed these provisions on the ground that it would be inappropriate for an administrative official to determine complicated questions pertaining to the antitrust laws. This, however, is quite beside the point. As CBS points out in its brief (p. 63), one of the principal matters pertaining to "monopoly" with which Congress was concerned at that time was the patent pool between AT &

T, GE, and RCA, involving patents for radio tubes and other equipment. It was quite natural that Secretary Hoover should oppose being burdened with the task of determining whether this very complicated factual situation involved an antitrust law violation, and quite natural that he was successful in persuading Congress that such a decision should be left to the courts.

Examination of the entire Act and its legislative history thus discloses that Congress intended the Commission, in applying the public interest standard, to consider the implications (for the fullest and most effective use of broadcasting facilities) of monopoly, concentration of control, and other restraints on competition in the industry.[51]

b. *Administrative construction.*—In accordance with this legislative authorization, the Commis-

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[51] Appellants make the further contention (NBC Br. 91; CBS Br. 71–79) that even if the Commission can take competition into account, it exceeded its statutory authority in this case because the Commission mistakenly believed that it was its duty to compel competition regardless of its effect on the listening public and on the industry. This argument is simply without foundation. In fact, it is evident from the Commission's report that quite the contrary is true (NBC R. 93, 95, 97, 98, 101, 102, 111, 113; CBS R. 113, 115, 117, 118, 121, 122, 131, 133). The Report clearly shows, as the court below found, that "Each regulation was a specific exercise of power addressed to a particular practice which interfered with the most 'effective use of radio in the public interest'" (NBC R. 528; CBS R. 489).

sion has consistently adhered to the view that it should exercise its licensing and other powers so as to prevent monopoly and foster competition. In several instances it has granted or refused consent to a transfer of control of a station accordingly as competition would be increased or diminished. *Western Broadcast Company*, 3 F. C. C. 179 (1936); *Memphis Commercial Appeal Co.*, 6 F. C. C. 419 (1938). Often it has refused, on account of the monopoly or competitive factor, to grant a license or to consent to a transfer which would result in ownership of two stations in a given community by a single licensee.[52] Also, the Commission has given consideration to the furtherance of competition by giving preference to a non-newspaper applicant over a newspaper applicant.[53] Finally, the Commission, in granting an application for a construction permit for a second station in a community, has stressed the

[52] *WSMB, Inc.*, 5 F. C. C. 55 (1938); *Genesee Radio Corp.*, 5 F. C. C. 183 (1938); *Louisville Times Co.*, 5 F. C. C. 554, 558–559 (1938); *Colonial Network, Inc.*, 5 F. C. C. 654 (1938); *El Paso Broadcasting Co.*, 6 F. C. C. 86, 106–107 (1938); *Carolina Advertising Company*, 6 F. C. C. 230 (1939); *Coryell, Sr., and Coryell, Jr.*, 6 F. C. C. 282 (1938); *Citizens Broadcasting Corp.*, 6 F. C. C. 669 (1938); *Portland Broadcasting System, Inc.* (*WGAN*), File No. B1-P-2912, October 28, 1940, 8 F. C. C. ——; *South Bend Tribune*, File No. B4-P-900, March 1, 1941, 8 F. C. C. ——.

[53] *Port Huron Broadcasting Company*, 5 F. C. C. 177 (1938); Proposed Findings, *Stephenson* (Docket Nos. 5779 and 5870, March 31, 1941), 8 F. C. C. ——.

benefit to be expected by the community from this creation of competition."[44]

In the new fields of frequency modulation (FM) and television broadcasting the Commission has by regulation sought to avert monoply or undue concentration of control. Commission Regulation 3.230 declares a policy against licensing more than one frequency modulation station in any community, or more than six such stations altogether, to one applicant. Regulation 4.226 declares the same policy with respect to television stations, except that the latter limitation is fixed at three stations.

It is thus clear that consistently and extensively the Commission has interpreted the standard "public convenience, interest, or necessity" in the light of the congressional intention that the policy against monopoly and other restraints on competition shall apply to the field of radio broadcasting. These interpretations are of considerable weight in determining the meaning of the standard, "public interest, convenience, or necessity" contained in the Act. Cf. *Norwegian Nitrogen Products Co.*

[44] Proposed Findings, *Presque Isle Broadcasting Company* (Docket No. 5426, January 25, 1940), 8 F. C. C. ——. The Commission said: "A second broadcasting station located in Erie would compete with Station WLEU for the patronage of advertisers and for listening audiences. The competition between two local broadcasting stations would be expected to result in improvements in each and corresponding benefits would thus be received by members of the listening public. It is apparent that such competition will promote public interest."

v. *United States*, 288 U. S. 294, 315; *United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

c. Judicial decisions.—Even in the absence of legislative and administrative evidence pointing to the relevance of free and fair competition to the "public interest, convenience, or necessity," that factor has an obvious pertinence where the "public interest" requires the fullest and most effective use of limited facilities. Cf. *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35.[55] In the instant

[55] In that case, a railroad had applied to the Interstate Commerce Commission for permission to extend its railroad line, and the statute (Section 1 (18) of the Interstate Commerce Act) directed the Commission to issue a certificate for the construction only if the "public convenience and necessity" so required. The Commission issued the certificate solely on the ground that "competition between carriers and competitive service to shippers" would result (p. 38); and the suit challenged the Commission's authority to issue the certificate upon that basis. Nothing in this portion of the Interstate Commerce Act expressly suggested that competition should be taken into account, but this Court held that the Commission correctly relied on that consideration. Furthermore, in that case, as in this one, there was a wholly distinct section of the Act in which competition was expressly referred to, to wit, Section 5 (4) of the Interstate Commerce Act, which directed the Commission to prepare a plan for the consolidation of railway properties with the direction that under the plan "competition shall be preserved as fully as possible." There, as here, it could have been argued that the express reference to competition in one portion of the Act forbade its implication in another portion, but the Court drew exactly the opposite conclusion, and found support for its decision under Section 1 (18) in the language of Section 5 (4).

case the history and administration of the Act do not leave to inference the conclusion that the fostering of competition in radio broadcasting has bearing on the "public interest, convenience, or necessity." And this Court has on more than one occasion recognized that the preservation of free competition and the preventing of monopoly in broadcasting were cardinal objectives of Congress in enacting the Communications Act of 1934. Thus, in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, where it held that the Commission might license a new station despite economic loss which would thereby be occasioned to an existing station, this Court pointed out (pp. 474–475):

> Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

And the Court concluded (p. 476):

> If such economic loss were a valid reason for refusing a license this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a

result which the Act itself expressly negatives * * *."

Similarly in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, it was recognized that:

> Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses. * * *

"Basing their contention on a phrase from the opinion in the *Sanders* case—"But the Act does not essay to regulate the business of the licensee"—the networks argue (NBC Br. 52–53; CBS Br. 42, 52) that the Commission has no jurisdiction over the contractual relations between licensees and networks because they are "business" practices and policies beyond the pale of Commission action. The argument, however, misconstrues the language of the opinion. The meaning of the phrase is that the Commission has no such authority to regulate the business practices of broadcast licensees as it has in the case of common carriers. Thus the Commission cannot regulate the rates of broadcast licensees, prescribe a uniform system of accounts, or the like. But this no way suggests that the Commission, in exercising its licensing function, must ignore practices which frustrate the Act's objectives, merely because those practices pertain to the "business" of the licensee. Indeed, the opinion in the *Sanders* case itself, as appears from the quotations above, makes it clear that the Commission is not so restricted. Any other conclusion would make it impossible for the Commission to maintain, through appropriate administrative action, a grip on the "dynamic aspects of radio transmission" and to foresall "monopolistic domination in the broadcasting field." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137–138.

Indeed, the "public interest" in preserving free competition in the field of radio broadcasting is emphasized by the physical character of broadcasting operations. As this Court has recognized, the existence of physical conditions which restrict economic opportunity in a given field accentuates the need for preventing the superimposition of artificial restraints in that field. *Cf. United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383, 405. The physical nature of the radio spectrum limits the number of radio stations, and consequently the number of outlets available to networks in the various radio markets. These inherent extrinsic limitations on broadcasting possibilities restrict the area of competitive opportunity in the field, and by that very token make "it the more important that such opportunities as may exist for fair competition should not be impaired." *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 600.

B. THE COMMISSION PROPERLY EMBODIED ITS POLICIES IN GENERAL REGULATIONS

Appellants argue (NBC Br. 78–88; CBS Br. 49–50) that even if the Commission does have the power to deny a license or a renewal on the ground that a particular affiliation contract prevents an individual station from operating in the public interest, the Commission was nevertheless without power to issue rules and regulations of general applicability. This contention is in fla-

grant disregard of numerous express provisions of the Act."[51]

Section 4 (i) declares:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Section 303 provides that—

> the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

[51] The cases cited by NBC (Br. 79–85) do not support its contention. In *Waite* v. *Macy*, 246 U. S. 606, the regulation at issue made the presence of coloring matter, even coloring matter which was not impure, an absolute ground for exclusion whereas the statute prescribed the presence of impurities as the basis for exclusion. The Court held that the particular regulations of the Tea Board were unreasonable; it did not hold that the Tea Board lacked authority to issue general regulations. In *Work* v. *Mosier*, 261 U. S. 352, the statute under which the Secretary of the Interior purported to make the regulation did not confer on the Secretary any rule-making power. In *Steinmetz* v. *Allen*, 192 U. S. 543, the regulation promulgated was inconsistent with the statute which had been previously interpreted by the courts to permit, in a proper case, the joint application which the Patent Office proposed to prohibit absolutely. In *Miller* v. *United States*, 294 U. S. 435, while the compensation provisions of the Act expressly provided that the loss of one hand and the sight of one eye was to be conclusively deemed total permanent disability, no such provision was made in the insurance section contemporaneously

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act * * *;

* * * * *

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. * * *

Thus the Act, not once but four times, gives the Commission a general authorization to issue regulations; and specifically gives it authority to issue regulations in the field of chain broadcasting.

Even aside from these explicit provisions, the Commission would probably have authority to issue regulations under the general authorizations contained in Section 4 (j) "to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Certainly it would seem that it would expedite business and further the ends of justice for an administrative body to formulate

enacted. The regulation was thus held invalid because there was evinced a congressional intent that no such conclusive presumption was to be applicable in the administration of the insurance provisions of the act.

in general terms the policies which it proposes thereafter to follows. See *Final Report of the Attorney General's Committee on Administrative Procedure,* S. Doc. 8, 77th Cong., 1st sess., p. 27; and compare *Securities & Exchange Commission* v. *Chenery Corp.,* No. 254, this Term, decided Feb. 1, 1943.

Nor is there any basis for the suggestion (NBC Br. 87; CBS Br. 49) that the regulations are "iron bound" and constitute an abdication by the Commission of all discretion. The Commission must apply the statutory standard of public interest, convenience, or necessity to each application for a license in the light of the facts pertinent to the application. Each applicant (unless his application is granted without a hearing) is entitled to a hearing not only that he may have an opportunity to show that he is entitled to a grant of an application under the established policies of the Commission, but also that he may show, if necessary, that such policies are not appropriate in his particular situation. In fact, the Commission has adopted rules for the specific purpose of protecting the rights of such applicants in enabling them to make such a showing if they can (Sections 1.72 and 1.81)."

* * * * *

" *Federal Communications Commission* v. *National Broadcasting Company (KOA)*, No. 585, this Term, certiorari granted January 18, 1943, is a good example of a case where

To conclude—the system of broadcasting regulation established by the Communications Act finds few parallels abroad, where broadcasting is usually a government monopoly, or is monopolized by huge quasi-public corporations operating under rigid governmental supervision (Huth, *La Radiodiffusion Puissance Mondiale, passim*). Congress might have travelled all or part way down that road. At any time during the last decade or more, Congress might have determined to treat the networks as the major responsible units in the broadcasting field, and thus have moved in the direction of regulated monopoly or quasi-monopoly.

But Congress has chosen a different means of promoting a free and efficient broadcasting service of maximum public usefulness. The context of the Act and its legislative history demonstrate Congress' unwillingness to contemplate a monopoly or near-monopoly, or to embark on the detailed regulation which such a structure would require. Instead, strong reliance was placed on competition as an incentive to effective public service and responsibility for serving the public interest was reposed squarely and commandingly on the many station licensees; and specific man-

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the Commission granted an application which did not comply with its allocation rules when the applicant was able to show that public interest would be served by not adhering to the regulation.

dates prohibit the shifting of that responsibility to other shoulders, lest the concentrated power which Congress feared should develop by a process of accretion.

II

THE REGULATIONS ARE REASONABLE

The validity of administrative regulations depends not only upon the statutory authority to issue them, but also upon their reasonable relation to the statutory objectives. The scope of the issue concerning reasonableness is narrow. The judicial inquiry is at an end if there is found a rational relation of the regulation to the statute, and to the ends sought to be achieved; the question is whether the particular alternative which the Commission selected among many alternatives to achieve the objectives of the Act is one which, in the circumstances, a rational person could have chosen. Cf. *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. 8, 77th Cong., 1st Sess., pp. 116, 117, 119. Only if the regulations are unreasonable, arbitrary, or capricious will they be set aside. *American Telephone and Telegraph Co.* v. *United States*, 299 U. S. 232, 236–237; *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 182; *Chicago, R. I. & P. Ry.* v. *United States*, 284 U. S. 80, 95–96; *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S.

479, 484, 487.[39] And, as the court below observed (NBC R. 530; CBS R. 491), the doctrine of administrative finality applies with "special force" when the judgments involved in promulgating regulations are necessarily prospective. Cf. *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 581; 311 U. S. 570, 575–577. Here the basic disagreement among the parties relates to the future effect of the regulations; the resolution of the conflicting contentions is within the particular competence of the Commission charged with dealing with these matters.

The test of reasonableness is squarely met by the instant regulations. The essential facts of the business and practices of network broadcasting, summarized above (pp. 15–36) and fully described in the Commission's report are not in dispute. Those facts establish the dominance of the appellant networks in the field of broadcasting, and the Commission, upon its plainly reasonable finding that dominance exists (NBC R. 66–70; CBS R. 86–90), was further warranted in concluding (NBC R. 82–115; CBS R. 102–135) that

[39] Indeed, in passing upon the validity of administrative regulations, this Court has even invoked a presumption of the existence of facts to support the regulations. *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176; *United States* v. *Rock Royal Co-operative*, 307 U. S. 533, 567–568; *St. Joseph Stockyards Co.* v. *United States*, 298 U. S. 38, 83 (Brandeis, J., concurring).

the dominance leads to an undue restriction of stations in their choice of programs, to impairment of competition between stations, to limitation upon the development of other than appellant networks, and their ability to render public service, and to depriving the listening public of other network or local programs. Such results fully support the conclusion that the existing practices are not in the public interest. The salutary effect of competition is lost; local and community interests tend to be sacrificed to national and business considerations which are normally given almost absolute priority; and affiliated stations lose a large degree of their independence.

These evils justify the Commission's remedial action. The facts and the reasonable conclusions relating to the effects of these facts warrant regulations designed to ameliorate the evils. We submit that the particular remedial regulations which the Commission chose are appropriately shaped to achieve this purpose. The regulations are in harmony with, and further, the basic statutory principles of station responsibility, of maximum use of facilities, and of preservation of competition and prevention of concentration of control.

While we shall examine each of the regulations individually, it should be noted that they cannot be appraised *in vacuo*. The various practices considered by the Commission do not

operate in isolation but rather, as the Commission found (NBC R. 111; CBS R. 131), "they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each singly."[60]

A. *Regulation 3.101—Exclusive Affiliation.*—Regulation 3.101 (*supra*, p. 5) provides that no license shall be granted to a station which has a contract with a network organization under which the station may not broadcast programs of another network. The Commission found that a contractual provision of this nature "hinders the development of other national networks" (NBC R. 87; CBS R. 107),[61] deprives the public of the programs of other networks in the many areas where all stations are under exclusive contract to NBC or CBS (NBC R. 87; CBS R. 107),[62] and denies station

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[60] For examples of the interdependence of the practices and their joint impact, see the Commission's Report (NBC R. 111–113; CBS R. 131–133).

[61] The Commission found (NBC R. 91; CBS R. 111), and the record shows (Tr. 3464–5), that in fact CBS adopted the exclusive affiliation provisions to obstruct new networks; and similarly that NBC included such provisions in 1936 only after some of its affiliates had begun to broadcast Mutual programs (NBC R. 87; CBS R. 107; Tr. 1859).

[62] The Commission found (NBC R. 87; CBS R. 107) that there are 45 cities with a population of 50,000 or more served by NBC or CBS or both to which no other network can obtain access under the exclusive affiliation provision. The provision not only excludes others absolutely, but in other important areas remits other networks to inferior outlets (NBC R. 87; CBS R. 107).

licensees "freedom to choose programs which they believe best suited to their needs" (NBC R. 88; CBS R. 108).

These considerations are fully supported by the testimony of witnesses at the Commission's hearings.[63] For example, the chairman of a group of independent radio network affiliates and president of a station which served as an outlet of both NBC and Mutual expressed his belief (Tr. 7950–51) that his station gives "the public better service because we have the choice of two good sets of programs," and testified that the public reaction to the station's wider offerings was not adverse but rather "we have been highly complimented."

The broadcasting of the baseball World Series in 1939 sharply illustrates the practical effect of the contractual provisions relating to exclusive affiliation. The program, carried by Mutual, was offered by it to a number of NBC and CBS affiliates in communities where Mutual had no outlets. NBC and CBS invoked their exclusivity clauses and so prevented their affiliates from broadcasting a program of outstanding interest to a substantial portion of the public which was thus altogether deprived of the service (NBC R. 88; CBS R. 108).

These circumstances establish the reasonableness of the regulation. If the Commission has

[63] Weber, Tr. 5169–70, 5172–74, 8251–2, see also Tr. 5177, 8272; McCosker, Tr. 5459–60; Shepard, Tr. 6666–68, 6669–70; Rosenbaum, Tr. 7950 *et seq.*; Baldwin, Tr. 6521; Roosevelt, Tr. 6289–90, 8304–5.

power at all to promulgate regulations dealing with such a situation, as we have shown in Point I, that it has, Regulation 3.101 forbidding the exclusive affiliation provision is plainly a rational remedy to achieve the permissable objective. Indeed, the exclusive affiliation provision of the network contracts is hardly distinguishable from other forms of exclusive tying agreement which may properly be forbidden in order to promote the public interest. See 38 Stat. 731; 15 U. S. C., Sec. 14.

NBC (Br. 17, 96) and CBS (Br. 17, 19, 93–95), however, insist that the regulation is unreasonable on the grounds that they spend large sums to provide their affiliates with fine sustaining programs which enhance the advertising value of their affiliates by building audiences and that it would be unfair for other networks to capitalize on these values by utilizing NBC or CBS affiliates as outlets; that, lacking exclusivity, NBC and CBS will have no further incentive to produce fine sustaining programs; that exclusivity protects the industry against "wild cat" networks promoted by opportunists; and that exclusivity divides network business more evenly among large and small stations."

" These arguments were made by NBC and CBS witnesses in the course of the Commission's hearing (Hedges, Tr. 1852–54; Paley, Tr. 3462–64; Weiss, Tr. 5489–92; Sarnoff, Tr. 8520–22; cf. Ethridge, Tr. 6666–68; Shepard, Tr. 5669–72), and were expressly rejected by the Commission (NBC R. 87–93; CBS R. 107–114).

These arguments are insufficient to establish that the regulation is unreasonable. If it is true that exclusivity prevents the growth of "wild cat" or irresponsible networks, it is also true, and far more important, that exclusivity is equally an obstacle to the rise of responsible and capable competitors of NBC and CBS. Competition can be depended upon to eliminate the irresponsible and inefficient, and to encourage responsible and efficient competitors to render valuable public service. Similarly, competition can be relied upon to insure that NBC and CBS will not degrade their own competitive stature by failing to produce the best commercial and sustaining programs of which they are capable.

The suggestion that it would be inequitable for other networks to capitalize on the audiences built by NBC and CBS sustaining programs ignores the fact that the stations bear a large share of the burden of such programs.[85]

Nor can it be said that the Commission unreasonably concluded (NBC R. 92; CBS R. 112) that, far from suffering as a result of the regulation, smaller stations would benefit. The very consequences which appellants urge as establishing the caprice of the regulation are those which now exist

[85] Stations furnish the time for sustaining programs; and in addition, access to sustaining programs is part of the consideration for which stations agree to give NBC and CBS free time, and time at a reduced rate, which the networks then sell to advertisers (NBC R. 73, 76–78, 90; CBS R. 93, 96–98, 110).

partly as a result of exclusivity provisions. The great majority of the large stations are already either operated by NBC or CBS or affiliated with the NBC or CBS networks (NBC R. 67; CBS R. 87); in general the smaller stations are unaffiliated and must look elsewhere than to the appellant networks for their programs and commercial advertising. In these circumstances, appellants' argument that prohibition of exclusive affiliation contracts will still further strengthen large stations at the expense of small ones is premised upon the highly improbable assumption that, under the regulation, the large stations will abandon the CBS or NBC programs which they now carry, in favor of programs currently broadcast by smaller stations, of Mutual or of a new network."

Further, as the Commission found (NBC R. 93; CBS R. 113), the elimination of exclusivity

"CBS and NBC are, in any event, hardly in a position to urge the regulation's supposed disastrous effects upon smaller stations, since those two networks manage and operate stations which are among the most powerful in the country, while their affiliated stations are generally the largest and most desirable in their respective communities (NBC R. 67; CBS R. 87). Similarly, stations WHAM at Rochester and WOW at Omaha, which are joined as plaintiffs with NBC, are, in respect of power and frequency, each the most desirable in their respective markets and exemplify the "most powerful stations" to which appellants insist all the "lucrative programs would gravitate" (see CBS Br. 95; NBC Br. 96). It seems improbable that stations would oppose regulations which would cause business to "gravitate" to them. Nor could they claim irreparable injury.

seems likely to introduce a greater amount of flexibility by giving advertisers a wider range of choice in respect of rates and coverage; if smaller stations are available to a national advertiser, he may strike a more precise balance between costs and coverage. In addition, insofar as the regulation makes possible the entrance of new networks into the field, there would be a greater demand for all stations and a wider latitude for all stations in obtaining network programs. And in any event, the "first call" permitted under Regulation 3.102 (*infra*, p. 88) will preserve for the smaller stations at least as much network business as they now enjoy.

Finally, that elimination of the exclusive affiliation provision will not have the disastrous effects upon the business of network broadcasting which appellants urge would seem to be fully demonstrated by current practices of the networks themselves. Although exclusivity clauses have until recently been embodied in a few NBC affiliation contracts, NBC's complaint does not claim that such clauses are now in effect.[47] On the contrary, it affirmatively appears that NBC has entirely abandoned exclusivity on the express ground that exclusivity provisions are "not essential to the

[47] NBC's complaint merely alleges (par. 36, NBC R. 12) that Regulation 3.101 would prevent exclusive clauses in new contracts; there is no allegation that NBC now desires to reinstitute exclusivity, or that any station objects to its elimination or desires its inclusion in a new contract.

existence of the industry," and though "desirable," are not "indispensable" (NBC R. 362–363).

B. *Regulation 3.102—Territorial Exclusivity.*—Regulation 3.102 (*supra*, pp. 5–6), a corollary to Regulation 3.101, declares a policy against contracts between a station and a network organization which prevents or hinders another station serving substantially the same area from broadcasting those network programs which are rejected by the contracting station, or which prevents or hinders another station in a different area from broadcasting network programs.[88] But contracts by which a station is given first call in its primary service area upon the network's programs are expressly permitted.

Much the same considerations which establish the reasonableness of Regulation 3.101 warrant the promulgation of this regulation. The territorial exclusivity provisions embodied in the contracts do more than prevent duplication, an end which, in itself, is unobjectionable. As the Commission found (NBC R. 93–95; CBS R. 113–115), these provisions also protect the affiliate from the competition of another station in the same area and deprive the listening audience of programs

[88] This type of "extra-territorial" exclusion is embodied in contracts between Mutual and the Don Lee regional network. This provision bars every station on the Pacific Coast except Don Lee affiliates from receiving Mutual programs, even though the other stations are not within the service area of any Don Lee affiliate (NBC R. 114–115; CBS R. 134–135).

which might otherwise be available. An affiliated station may, and often does, reject a network sustaining program;* under the territorial exclusivity clause, if it does so, no other station serving the same area may carry the program since the network is forbidden to offer it to other stations.

The restrictive effects of these provisions and the consequent diminution of competition among stations, narrowing of network service, and limitation of programs available to the public are plain. As the Commission noted in its Report (NBC R. 95; CBS R. 115), "It is as much against the public interest for a network affiliate to enter into a contractual arrangement which prevents another station from carrying a network program as it would be for it to drown out that program by electrical interference." In these circumstances, a prohibition of such clauses is plainly reasonable. Full protection against duplication is afforded under the regulation, which strikes only at the evils attendant upon territorial exclusivity clauses. And the record establishes that no serious injury is done to the network broadcasting structure by the regulation. NBC has granted territorial exclusivity clauses only rarely, and then reluctantly and after a "knock-down drag-out

* In contrast to the limitations upon an affiliate's right to reject a network *commercial* program (see *infra*, pp. 105–106), an affiliate may normally refuse to carry a *sustaining* program for any reason whatever (NBC R. 76; CBS R. 96).

fight" (Hedges, Tr. 1964–67). Nor does CBS, which uniformly grants exclusivity, claim injury to its network; it urges only that the regulation is harmful to affiliates (CBS R. 237). But the only harm which may be done to CBS affiliates is the harm which derives from insisting upon abandonment of monopolistic practices, for the record shows that CBS rests its claim of advantages accruing to affiliates from territorial exclusivity upon the fact that "Columbia programs are not available to their competitors in their area, and they are certain of income from whatever national sales Columbia makes in their territory" (Paley, Tr. 3466).

C. *Regulation 3.103—Duration of Affiliation Contracts.*—The standard NBC and CBS contract with their affiliates binds the affiliates for five years, with the right of the network, but not the affiliate, to terminate the contract upon a year's notice (NBC R. 71; CBS R. 91; Tr. 1819, 1903, 8812, 3638, 3681; Tr. Exh. 282, cl. 14).[70] The Commission found that these long-term contract provisions tend to diminish competition among stations for network affiliation, and to impede the establishment of new networks; it also found that the contracts deprived the stations of a desirable flexibility which would permit them to make ap-

[70] As has been pointed out (*supra*, p. 28, note 32) NBC has apparently surrendered its right of cancellation upon a year's notice.

propriate adjustments to changes in local needs or in the character or quality of network service (NBC R. 95–98; CBS R. 115–118). Accordingly, Regulation 3.103 (*supra*, p. 6) limits the contract of affiliation to a period not longer than two years.

The record provides firm basis for the Commission's conclusions and for the reasonableness of its two-year limitation. While the opinions of witnesses were in conflict,[71] the testimony establishes that the five-year affiliation contract was developed in order to protect NBC and CBS from losing their affiliates to other networks,[72] and was, accord-

[71] Witnesses who opposed limitations upon the length of affiliation contracts included Hedges, Tr. 1819–20; Lohr, Tr. 2595–98; Akerberg, Tr. 3718–19; Sarnoff, Tr. 8542–46; Elliott Roosevelt, Tr. 8309. Two witnesses for the Mutual Broadcasting System favored a two-year limitation. McCosker, Tr. 5448–51; Weber, Tr. 8283–84. See also the testimony of Mr. Rosenbaum, Tr. 7936–37.

[72] NBC: Hedges, Tr. 1819–20: "Our present contracts run up to five years. The reason for that was simply this: With a contract of this nature, which I have just described, where a station may cancel upon a year's notice, we were exposing ourselves to our competition. Our competition, so we were informed, were perfectly willing to sit down and negotiate contracts with such of our affiliates as it desired, and bide their time for the year to elapse before they could take over the stations.

"It seemed rather poor business for us to leave ourselves in such a vulnerable position. * * *"

CBS: Akerberg, Tr. 3719: "It has been my personal experience that a length of time up to five years has been the practical period of time because should there be a year

ingly, designed to restrict competition. Indeed, it appears that NBC embodied its five-year provision only in 1936, in response to the threat of the recently formed Mutual system (NBC R. 95; CBS R. 115; Tr. 1819–1820, 3719).

Before the Commission, NBC grounded its contention that the regulation would be unreasonable upon its argument that it entered into leases for studio space and invested large sums in equipment in reliance upon the five-year contracts (Lohr, Tr. 2598; Sarnoff, Tr. 8545–46). But, as the Commission found, analysis shows that this contention is an afterthought. From 1927 to 1938 NBC built 17 studio plants at a total cost of $7,719,200. Eleven of these seventeen studio plants, built at a cost of $5,519,700, or 71 percent of the total, were completed prior to 1936, while the term of the NBC affiliation contract was still only one year[73] (NBC R. 96; CBS R. 116; Tr. Exh. 64).

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to year situation you would be continually renewing and renegotiating and renewing contracts, and you would also be vulnerable from a competitive standpoint."

[73] Shortening of the affiliation contract period presents no problem with respect to a contract between the network and the station for a particular series of programs which runs beyond the termination date of the affiliation contract. Such a series can be carried by the station even after it has shifted to another network, and in fact this not infrequently happens when a station changes its network affiliation. See the testimony of Shepard, Tr. 5658; Antrim, Tr. 4949.

What precise limitation constitutes a reasonable maximum for the duration of affiliation contracts is, of course, a matter of judgment. The Commission's conclusion that a two-year limitation is appropriate cannot be said to be unreasonable, particularly in the light of the fact that the permissible period is twice as long as that which was utilized by NBC for over a decade.

D. *Regulation 3.104—Option Time.*—CBS affiliation contracts and NBC contracts with stations west of Denver give the network an option on the station's time throughout the broadcast day. The NBC contracts with stations east of Denver place under option the hours from 10:00 to 12:00 noon, 3:00 to 6:00 p. m., 7:00 to 7:30 p. m., and 8:00 to 11:00 p. m.[74] All NBC and CBS option clauses require the station to broadcast network commercial programs on 28 days' notice during the hours covered by the option; all other program commitments of the station, whether to other networks or for non-network programs, are subject to cancellation or removal upon exercise of the option. (NBC R. 73; CBS R. 93; Tr. 3457; Tr. Exh. 282 cl. 2, 124 cl. III.)

Current option-time practices hamper the efforts of stations to build satisfactory schedules of non-network programs.[75] For example, NBC's

[74] On Sundays the hours are 1:00 to 4:00 p. m., 5:00 to 6:00 p. m., and 7:00 to 11:00 p. m.

[75] Hedges, Tr. 1802–1805; Paley, Tr. 3467; MacFarlane, Tr. 5318–21; Weiss, Tr. 5532–33; Sheppard, Tr. 5657–58.

Vice President in charge of station relations testified (Tr. 1802–03):

> During [network option] time then, if an advertiser, say, a national spot account or a local account, is sold network optional time the understanding that the station has with such a client is that he can play checkers with him and move him from one spot to another, keeping him within that network optional-time bracket but nevertheless keeping him out of the way of network programs.
>
> * * * * *
>
> From both the standpoint of the station and the advertiser, such a sale is somewhat less satisfactory than a firm placement during station time, for example. During station time the station is able to offer to the advertiser a fixed period and sell it on a guaranteed basis; he can sign up for 52 weeks if he desires and remain in that particular spot.

Similarly, the president of CBS testified that to some extent network option time "places a restriction on the station's untrammelled freedom of program selection" (Tr. 3467). The president of an association of transcription producers testified that the use of transcriptions has been seriously retarded by the fact that transcription pro-

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7858–60; King, Tr. 6398–400, 6478–80; Baldwin, Tr. 6504–07; Rosenbaum, Tr. 7953–54, 7957–58; Elliott Roosevelt, Tr. 8301–04, 8322–24.

grams are subject to removal by the exercise of network options (Tr. 6398–400, 6478–80). The Chairman of Independent Radio Network Affiliates and President of Station WFIL testified (Tr. 7953–54):

> A * * * I do know that quite frequently we have an opportunity to sell programs which we cannot accept because we cannot guarantee time owing to the fact that the time requested comes within NBC option time. We have, on several occasions, taken up with NBC, informally, a request to be permitted to guarantee time to an advertiser who wants to buy time which is included within the network option hours, but so far we have not succeeded.
>
> Q. (Mr. Funkhouser.) Were the programs that you lost such as to serve the public interest?
>
> A. I think so; they were commercial programs of good quality.
>
> Q. About the same pattern as your general program structure?
>
> A. At least as good.
>
> Q. Have you lost revenue on account of these restrictions?
>
> A. Naturally, being unable to accept commercial contracts for the reason that I have stated, we have not received the revenue from them.

Regulation 3.104 (*supra*, pp 6–7) affects these practices in three respects:

1. The minimum notice period for exercise of the option is extended to 56 days.

2. Not more than three specified hours in each of four segments of the day may be placed under network option. These four segments are 8:00 a. m. to 1:00 p. m., 1:00 p. m. to 6:00 p. m., 6:00 p. m. to 11:00 p. m., and 11:00 p. m. to 8:00 a. m. Thus in each of the three commercially important segments two specified hours must be immune from network option, and therefore will be available for firm commitments for non-network programs. The station may, however, *sell* (but not option) time to the network within the hours so withheld for a program or series of programs.

3. The option may not be used to displace a program commitment to another network, and the affiliation contract may not prohibit the station from optioning time to another network if it so desires.

Both the extension of the notice period and the limitation on the hours which may be optioned have the same purpose—to strike a balance between the convenience of the network in scheduling programs for simultaneous broadcasting over numerous affiliates and the freedom of the stations to schedule non-network programs on a stable basis.

The appellant networks contend (CBS R. 240-241; NBC R. 242) that the extension of the notice period to 56 days will hamper a network in clear-

ing time for its programs. That the 56-day requirement will disrupt network business is doubtful in view of the fact that the networks often give notice of the exercise of the option 60 days or more before the commencement of the program."[76]

Neither CBS nor NBC attack the requirement that certain specified hours be withheld from network option time."[77]

The third change in current network option time practices arises from the requirement that network options may not be utilized to displace the programs of other networks. The restraining effects of current option time practices on the development of new networks and on the distribution of network programs are aggravated by the fact that the time under option to CBS and NBC is, on the average, more than double the time actually used for commercial programs."[78] During the many hours which NBC and CBS hold under option but do not use commercially, other net-

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[76] Akerberg, Tr. 3660–62, 3701; Morton, Tr. 6897–6898.

[77] The effect of this requirement upon NBC will be almost negligible, since NBC now options only 2 hours in the morning, 3 hours in the afternoon, and 3½ hours (which under the regulation would be reduced to 3 hours) in the evening segment of the broadcast day.

[78] In 1938, CBS so used only 39% of the optioned hours of its basic network stations, while NBC used 58.1% on the basic Red and only 19.4% on the basic Blue network (NBC R. 99–100; CBS R. 119–120; Tr. Exh. 665, 670). The disparity between the hours covered by option and those actually used is far greater on non-basic or "supplementary" stations.

works can schedule programs on NBC and CBS affiliates only subject to removal or cancellation on 28 days' notice. This places them at a serious disadvantage because it is generally recognized that 13 weeks is the minimum period for which a network commercial program series can be scheduled.[39] (See testimony of Mr. Weber, Tr. 5192–95; Mr. Shepard, Tr. 7888–92.)

The appellant networks insist (NBC Br. 11–13, 96; CBS Br. 11–12, 16, 94) that Regulation 3.104 is impractical and unreasonable and is fatal to commercial network broadcasting. But analysis of the precise impact of the regulation, and of the extent to which it requires changes in existing methods, readily demonstrates that it will have no such disastrous consequences as appellants or *amicus curiae* Association of National Advertisers, Inc., predict.[40] Initially, it is to be emphasized

[39] NBC's Vice President in charge of sales testified: "We feel in radio a new advertiser is likely not to feel the benefits of his radio advertising until he has been on the air a considerable length of time. It depends upon the circumstances. It may be necessary for him to be on 26 weeks before he begins to get a real lift from his radio advertising. He may be on only a matter of a few weeks; one program may give him a tremendous reaction. It all depends upon the circumstances, but by and large we feel that 13 weeks of radio advertising is about the minimum for which an advertiser can expect to get results." Witmer, Tr. 2165.

[40] The Association of National Advertisers (Br. 25–26) suggests that under the Commission's option rule large advertising agencies would be able to form their own network by contracting with the most powerful stations and

that the regulation deals with *options* only; it is concerned only with the broad right, now enjoyed by the networks, to drive all programs off the station, even though contracts have been completed for such programs, as long as the right is exercised at least 28 days before the time scheduled for such programs. The regulation does not in any way limit the right of the station to *sell* time to a network for a program or series of programs. Thus, if a network and a sponsor have come to an agreement for the production and broadcasting of a program, the network can purchase from the stations time for the program for a week, or for a year, or for whatever period the advertiser desires. Once the time is purchased, the matter, insofar as the regulation is concerned, is settled; no other program can displace it. Thus stability remains and there is complete assurance for the network and the sponsor.

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that this would subtitute a monopolistic network of the large stations for the now highly competitive existing networks. It is stated that plans are under way to enter into such contracts if Regulation 3.104 is sustained. The short answer to this contention, which, it will be noted is made by an association of advertisers whose members would undoubtedly benefit by the regulation thus attacked, is that if it should be shown to the Commission that the public interest is adversely affected by such an "advertiser" network, the Commission could prevent the evil either by permitting the option granted by Section 3.104 to clear away the programs of the "advertiser" network or by other appropriate regulation.

The impact of the regulation is confined to the period *before* actual sale. Even so, its reach is comparatively limited. At any time up to 56 days before the contemplated program is to be broadcast, the network can exercise its option, within the permissible hours (*supra*, p. 96), and remove any programs which have been contracted for on the desired station except programs of other networks. Prior to the 56 days, therefore, the network can clear time as against all local, national spot, transcription, or other non-network programs which the stations have contracted to carry. The exception making it impossible to exercise the option so as to clear contracted-for programs of other networks simply affords equal competitive opportunity to all networks and precludes use of the option device to hinder other networks.

There is no sound basis for the suggestion that it is impractical and burdensome for CBS and NBC to communicate with their affiliates in order to ascertain whether a particular period is available. It is true that the networks, before closing an agreement with a sponsor, must first ascertain whether the desired affiliates have already contracted with other networks. But there are no great mechanical difficulties in the way of such ascertainment. Ready means are available for communication between network and affiliate. These communications are now carried on by the

networks as a routine matter under existing option clauses. In respect of NBC, the testimony of its Traffic Manager is conclusive in this regard: An interchange of telegrams is all that is necessary."[81] Similarly, CBS is excellently equipped to obtain practically instantaneous information from its affiliates; it maintains teletype machines at every station affiliated with it. CBS sends out telegraphic orders to its affiliates concerning the scheduling of commercial programs, and requires the stations "to advise as to their acceptance by return mail" (Cowham, Tr. 3300–3316). In the light of this testimony by NBC's and CBS's own witnesses, the suggestion of difficulty in checking with the station as to clearance for programs is plainly of insufficient substance to permit condemnation of the regulation as unreasonable.

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[81] Tr. 924–25: "Q. (Mr. Hennessey.) Now, Mr. McClancy, coming to your ordinary operating procedure, will you first describe the operating procedure which the traffic department follows in scheduling network commercial programs, and first with respect to a commercial program in network optional time where you are able to give the station 28 days' advance notice that the program has been scheduled?

"A. When the traffic department receives from the sales department an order for several groups of stations or several individual stations, the commercial traffic division passes that information along to the stations by telegraph, informing them of the name of the client, its product, when the program is scheduled to start, its time, also the talent. Based upon these facts, the station sends us a telegram either accepting or refusing the program."

Nor is there warrant for CBS's suggestion (Br. 16–17) that it will be faced with difficulty in its dealings with advertisers. In conformity with Regulations 3.104, CBS may option 3 hours during each of the morning, afternoon, and evening segments of the broadcast day over all of its affiliated stations. The option will be effective against all programs except those of another network. CBS can and undoubtedly will require its affiliates to keep it currently advised of commitments with other networks against which the CBS option may not be effective. Such information can be posted in convenient form so that, at a glance, CBS may determine what periods are available for commercial programs over each of its affiliates. An advertiser who comes to CBS with a request for 90 stations can be advised precisely and promptly what periods of time are available for clearance under the CBS option over the stations he wants. Should the advertiser then make his decision with respect to periods and stations, all that is required to bind the bargain with all the stations is a telegram (or teletype message) from CBS to its affiliates calling upon them to carry the program of the advertiser pursuant to their option-time arrangement with CBS. Once the affiliates have accepted and agreed to carry the program, the commitment is good against the world.

NBC (NBC R. 241) likens the possibility of confusion under the regulation to that of vehicular traffic operating without traffic lights. This simile would lead one to suppose that radio advertisers are as numerous as automobiles and networks as numerous as streets. It must be borne in mind that the option-time clause proposed by Regulation 3.104, like the option-time clauses currently in use, can be exercised to displace all non-network programs, and thus gives network programs right-of-way over all programs which might prevent the simultaneous broadcasting of network programs on numerous stations. Network advertisers are relatively few in number. An NBC witness estimated that there are only about 300 potential national network advertisers (Witmer, Tr. 2288); a CBS witness doubled this estimate (Kesten, Tr. 4114). Another NBC witness stated that perhaps 25 customers supply the majority of NBC's income (Lohr, Tr. 2595–98). In 1937 a total of only about 200 advertisers used the CBS and NBC (both Red and Blue) networks (Kesten, Tr. 4113; see also Witmer, Tr. 2229). There are only three national network organizations,[82] and the

[82] Regulation 3.104 requires that option-time clauses be nonexclusive as against regional as well as national networks. There are only seven regional networks of importance and three of these serve as "group outlets" for national networks (NBC R. 65, 139–146; CBS R. 85, 159–166).

program schedules of each are well known to its two competitors. Many programs are regarded as fixtures on a particular network; over a period of "some several years" CBS successfully solicited only some 42 new advertisers, and lost to other networks only 32 clients (Kesten, Tr. 4046). Negotiations with advertisers for new network programs are, in the nature of things, bruited about in the industry, and, because of the limited number of national network advertisers and the limitations which time itself places upon the volume of network advertising, not many negotiations for new contracts are ordinarily in course at any given time. Consequently, clearance as against non-network programs is in any event the chief value of network options insofar as they constitute a "business convenience" for clearing time.

Thus, it is clear that the Commission has retained the advantages of option time as a business convenience, to the maximum degree compatible with the public interest in competition and station responsibility. By forbidding option time as against other networks, the regulation ameliorates the evil of utilizing options to the detriment of rival networks and removes a serious obstacle in the way of development of new networks. By assuring local programs of a guarantee of at least 56 days' duration even during the hours which may permissibly be optioned, and of unlimited duration during those hours

which are not subject to option, the regulation substantially frees the stations to broadcast local programs and to cater more adequately to the local needs of the community. In these circumstances, we submit that the regulation is a plainly reasonable solution of the networks' business demands on the one hand, and the demands of free competition, station responsibility, service of local interests, and maximum use of facilities on the other.

E. *Regulation 3.105.—Station Rejection of Network Programs.*—The present form of contract entered into by CBS or NBC and their affiliates normally requires the affiliate to take and broadcast network commercial programs unless such programs are not in the public interest (NBC R. 74–75; CBS R. 94–95; Tr. 1795; Tr. Exh. 124 cl. III, 282 cl. 2).[22] As the Commission found (NBC

[22] The NBC contract provides that the station may reject a network program the broadcasting of which would not be "in the public interest, convenience, or necessity." This has been interpreted by NBC to permit the station to substitute a local sustaining program of outstanding public interest (NBC R. 74; CBS R. 94). But if the station rejects a program, NBC requires the station to "be able to support his contention that what he had done has been more in the public interest than had he carried on the network program" (Tr. 1795). In no circumstances may the NBC affiliate substitute a local commercial program; if it does so, it is subject, *inter alia*, to payment of liquidated damages to NBC (NBC R. 74; CBS R. 94).

The CBS clause relating to rejection of programs provides (NBC R. 74; CBS R. 94):

"Either the station or Columbia may on special occasions substitute for one or more of such sponsored programs sus-

R. 101–102; CBS R. 121–122), these provisions place practical difficulties in the way of a station which seeks to furnish the public with the best available programs. Precise information concerning the proposed network program usually is not, and cannot be, furnished to the station in advance (NBC R. 75; CBS R. 95; Tr. 1986–88, 1891). In no event may the station reject the network program for a local commercial program, regardless of the local interest in such program. And as a practical matter, the burdens upon the station of establishing the superiority of the local program, or of establishing that its rejection of the proposed network program is reasonable, are so great that the right of rejection is substantially empty of content.

In these circumstances, the Commission promulgated Regulation 3.105 (*supra*, pp. 7–8), which provides that affiliation contracts may not prevent or hinder the station from rejecting network programs (1) which the station "reasonably believes to be unsatisfactory or unsuitable," or which (2) in respect of network programs already contracted

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taining programs devoted to education, public service, or events of public interest without any obligation to make any payment on account thereof * * *. In case the station has reasonable objection to any sponsored program or the product advertised thereon as not being in the public interest, the station may, on 3 weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the station shall be satisfied. * * *"

for, in the opinion of the station "is contrary to the public interest," or from substituting a program of "outstanding local or national importance."[*] The regulation does no more than reiterate the requirement of the Communications Act (Sections 301, 309, 310) that station licensees be personally responsible for the operation of their stations in the public interest. The Commission, accordingly, reasonably concluded (NBC R. 101–102; CBS R. 121–122) that such responsibility is not borne by a station which abdicates by agreeing to accept programs on any other basis than his own reasonable decision that the programs are satisfactory. Nor do we understand that appellant networks attack the regulation as arbitrary or capricious (see CBS Br. 12): Plainly the regulation which simply insists that the station fulfill its statutory obligation is reasonable.

F. *Regulation 3.106—Network Operation of Stations.*—Regulation 3.106 (*supra*, p. 8) provides that no license shall be granted to a network organization for more than one station per service area, or for any station in any locality where the existing stations are so few or of such unequal desirability that competition would be substan-

[*] In respect of programs already contracted for, the regulation conforms to the existing contractual provisions relating to rejection. See *supra*, note 83.

tially restrained by such licensing.[85] The Commission, in its Report, expressly, provided for the future operation of this regulation by further administrative proceedings. While it concluded that "the licensing of two stations in the same area to a single network organization is basically unsound and contrary to the public interest," the Commission stated that in any particular case, networks will be given full opportunity, upon application for new facilities or renewal of licenses, to advance reasons why the principles which the Commission found to be controlling should be modified or held inapplicable (NBC R. 105; CBS R. 125). Similarly, the Commission stated that as to the second situation covered by the regulation—ownership of a station in a locality where other station facilities are limited—networks have full opportunity and right to show at the license hearing that the public interest nevertheless requires network ownership of a particular station (NBC R. 105; CBS R. 125).

While the future operation of this regulation is thus incapable of precise ascertainment, since its application must necessarily await scrutiny of the particular circumstances in a licensing pro-

[85] Although the Commission noted that "as an original matter," it "might well reach the conclusion that the businesses of station operation and network operation should be entirely separated," the Commission concluded that it was "inadvisable to compel these networks to divest themselves of all their stations" (NBC R. 103; CBS R. 123).

ceeding, it is nevertheless plain that the provision is wholly reasonable. The facts of network ownership of stations establish the dangers of such practice. Thus, at the time of the Commission's Report, NBC was the owner and licensee of ten stations, CBS of eight. These 18 stations are among the most powerful in the country (*supra*, p. 22).[56]

Network ownership of stations, as the Commission found (NBC R. 103; CBS R. 123), permanently renders such stations inaccessible to competing networks; thus some of the most important stations in the critical areas are entirely withheld from network competition and reserved exclusively to their network owners. The discouraging effect of this situation upon the creation and growth of new networks is plain.[57] Especially is this effect apparent in the two particulars with which the regulation deals: the network ownership of two stations in a single area, and such ownership of a station in a locality where the available facilities are few and of unequal coverage. Thus, for example, at the time of the Report, in Washington, D. C., NBC owned two of the three regional stations, and CBS the only clear-channel station. In

[56] Of the 25 1-A clear-channel stations in the country, NBC and CBS are the licensees of ten (NBC R. 103; CBS R. 123).

[57] The Commission also noted the dual position created by network ownership of stations; the networks' interest as the owner of stations may conflict with its interest as a network organization serving affiliated stations (NBC R. 103; CBS R. 123).

Charlotte, N. C., there are but two stations, one of which is a 50,000 watt station owned by CBS."

In situations such as these, competition of new networks is virtually foreclosed. If the Commission has authority, as we submit it has, to consider the public interest in avoiding dominance and in encouraging competition, this regulation is clearly a permissible and rational remedy to achieve those objectives.

G. *Regulation 3.107—Operation of More Than One Network by a Single Network Organization.*—Regulation 3.107 (*supra* pp. 8–9), provides that no license shall be issued to a station which is affiliated with a network organization which maintains more than one network. It relates primarily to the operation by NBC of two networks. The considerations underlying the Commission's adoption of this regulation are set forth in its report (NBC R. 106–109; CBS R. 126–129). The regulation has been indefinitely suspended (NBC R. 211–212; CBS R. 29–31) and its validity is, accordingly, now moot.

H. *Regulation 3.108—Network Control of Station Rates for Non-network Programs.*—Regulation 3.108 (*supra* p. 9) is directed against the inclusion in affiliation contracts of a clause which only NBC among the national networks has ever incorporated in its contracts. This clause empowers NBC to reduce a station's network rate and

" In April 1941, the Commission granted a permit to construct a third station in Charlotte. No license has yet been issued.

compensation from network commercial program if the station sets a lower rate for non-network national advertising than the network card rate for the station (NBC R. 109; CBS R. 129; Tr. Exh. 133). The purpose of the clause is frankly to protect the network against competition of its affiliates (NBC R. 109–110; CBS R. 129–130).

The clause has since been eliminated from NBC contracts.[89] While NBC's complaint seeks an injunction against this regulation, it does not allege either that such clauses are embodied in any of its affiliation contracts or that it desires to embody such a clause in future contracts (NBC R. 11–12). In any event, the Commission was clearly warranted in striking down this method of coercive price-fixing; the reasonableness of the regulations readily appears from the Commission's report (NBC R. 109–111; CBS R. 129–131) summarized above (pp. 35–36) in the Statement.

Conclusion.—The foregoing analysis of the several regulations, we submit, establishes their reasonableness both singly and in combination. And, indeed, we do not understand that appellant networks attack each particular regulation as unreasonable. Rather, they content themselves with the broad contention (CBS Br. 89–96; NBC Br. 88–90, 96–97) that network broadcasting would be

[89] See the testimony of Niles Trammell, NBC President, in Hearings before S. Committee on Interstate Commerce, on S. Res. 113, 77th Cong., p. 462.

seriously injured. In the course of its argument on this branch of the case (Br. 88–98), NBC refers only to option time (Regulation 3.104);[90] similarly, CBS in its argument (Br. 89–96) confines itself to Regulations 3.101, 3.102, and 3.104. Yet as we have noted (*supra*, pp. 81–82), the various practices with which the regulations deal do not operate in isolation and, accordingly, neither do the regulations.

Nor, we submit, is there warrant in any event for the contention that the regulations will tear down the entire structure of network broadcasting. True, the regulations will require abandonment of some rather "convenient" business practices. But such abandonment will entail no such revolutionary destruction as appellants depict. As we have seen, NBC itself has abandoned its exclusivity clause dealt with in Regulation 3.101 (*supra*, pp. 87–88); as to Regulation 3.102, it has only rarely granted territorial exclusivity, and thus only reluctantly (*supra*, pp. 89–90); for over a decade it operated with affiliation contracts extending only a year (*supra*, p. 92)—half as much as Regulation 3.103 permits; it appears to make no contention that Regulation 3.105 injures its business; it concedes (Br. 6) that its complaint is not "primarily directed" to Regulations 3.106

[90] Thus in its "Statement" (Br. 20), NBC observes only that Regulation 3.104 "strikes at the heart of network broadcasting; the remaining regulations blanket the entire field."

and 3.107; and it has itself eliminated the rate clauses dealt with in Regulation 3.108 and makes no contention that it desires to reinstate them in their affiliation contracts (*supra*, p. 111).

As to CBS, Regulations 3.107 and 3.108 are admitted to be inapplicable to it (CBS Br. 9). In respect of Regulation 3.105, CBS notes that its affiliation contracts already "substantially correspond" to the regulation (Br. 12). The precise effect upon CBS of Regulation 3.106, as has been noted (*supra*, pp. 107–108) remains for its future application. And if NBC concludes, as we have seen it has, that its network operations can continue without the clauses dealt with by Regulations 3.101, 3.102 and 3.103, no reason is apparent why CBS would be destroyed by their abandonment.

This leaves only Regulation 3.104 with the supposed fatal effects. But, as we have seen (*supra*, p. 97), the enlargement of option time from 28 to 56 days conforms to the frequent practice of taking up options within the latter period, while neither of the appellant networks attack the limitation upon hours which may be subject to option. Indeed, the only effect of the latter requirement upon NBC will be to reduce the evening segment of the broadcasting day subject to option from 3½ to 3 hours (*supra*, note 77). And, finally, as we have described above (*supra*, pp. 98–104), the Commission's refusal to permit options exclusive against other networks in no way prevents

firm commitments by actual *purchase and sale;* and ready mechanical means are available to check for clearance and to ascertain promptly whether a firm commitment, good against everyone, can be made.

It is also to be noted that the testimony of the networks' own witnesses establishes that many of the contractual clauses dealt with by the regulations were adopted not to serve some public interest but solely for "competitive" reasons, i. e., to avoid or to meet competition. Thus, as we have seen, NBC's president in charge of station relations testified that the exclusive affiliation clause was adopted to prevent NBC outlets from affiliating with "any network which would seek to establish itself as a national advertising medium" and thus compete with NBC (Tr. 1852–1854); the president of CBS testified that the territorial exclusivity provisions were to exclude competitors and assure the CBS affiliates of income (Tr. 3466); NBC utilized the five-year affiliation clause because without it "we were exposing ourselves to competition" (Tr. 1819–1820), while a CBS witness similarly testified that absent the clause "you would also be vulnerable from a competitive standpoint" (Tr. 3718–3719); and NBC conceded that its rate provisions were to protect it against the competition of its own affiliate (Tr. 1825–1826).

In sum, we submit that the Commission's action, far from being arbitrary and capricious, rep-

resents a moderate accommodation of existing business practices to the public interest. What loss is suffered by appellant networks in their comfortable business habits is far out-balanced by the furtherance of the public interest in station responsibility, in maximum use of facilities, in competition, in greater flexibility and choice, and in larger emphasis upon local autonomy and local programs and affairs. The regulations are well calculated to achieve these *desiderata* without improperly or injudiciously disturbing the existing network broadcasting structure.

III

THE COMMUNICATIONS ACT, INTERPRETED AS AUTHORIZING THESE REGULATIONS, IS CONSTITUTIONAL

A. *There is no unlawful delegation of legislative power.*

CBS urges (Br. 79–83) that, if the Act is construed as conferring upon the Commission power to issue these regulations, it is unconstitutional and void in that its standards are too broad and therefore it delegates legislative power to the Commission in violation of the Constitution. This Court has repeatedly stated, however, that the Communications Act and its predecessor, the Radio Act of 1927, declare a policy and establish standards which meet constitutional requirements. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285; *Panama*

Refining Co. v. *Ryan*, 293 U. S. 388, 428; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137–138. These cases, as well as decisions sustaining other statutes containing similar language,[21] hold that the criterion of "public convenience, interest, or necessity" is not a "mere general reference to public welfare,"[22] but a phrase which gains content from its context and the purposes of the statute. In particular, the Court pointed out in the *Nelson Brothers* case, 289 U. S. 266, 285, that "The requirement is to be interpreted by its context, by the nature of radio transmission and reception, [and] by the scope, character and quality of services * * *". "While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy."[23] The standard of "public interest" in Section 5 (4) (b) of the Interstate Commerce Act is broad enough to permit the Interstate Commerce Commission's conditioning its approval of a proposed lease of carrier properties upon the carrier's compensating its

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[21] *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 24–25, and cases cited.

[22] *Ibid.*

[23] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138.

employees who suffer because of the lease;" similarly the standard of "public convenience and necessity" in Section 1 (18) of the Interstate Commerce Act permits the Commission to impose like conditions upon approval of consolidation for the protection of employees." It seems clear that if these standards are sufficiently broad to permit of such action without running afoul of constitutional limitations upon delegation of power, the instant standards, as construed, are not void.

It is thus plain that the standards contained in the Communications Act are sufficient. Whether the chain broadcasting regulations come within the standards is the question of statutory construction considered in Point I, *supra, pp.* 43–79. For the reasons there set forth, we believe that various provisions of the Act and its legislative history indicate that it was designed to permit regulations the object of which was to improve the character and quality of service to the listening public through the preservation of competition, and through assuring station responsibility and maximum use of facilities.

B. The regulations do not constitute censorship or an abridgement of freedom of speech

Appellants contend (NBC Br. 28–43; CBS Br. 83–88) that the regulations violate the First

[94] *United States* v. *Lowden*, 308 U. S. 225.

[95] *Interstate Commerce Commission* v. *Railway Labor Executives Assn.*, 315 U. S. 373.

Amendment [96] and the provision in Section 326 of the Communications Act that—

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. * * *

It is apparent from the face of the regulations that they do not regulate or restrict freedom of speech. They are concerned solely with the contractual relations between networks and affiliates, with the ownership of stations by networks, and with common control of more than one network. They are not concerned with program content and in no way attempt to regulate what may or may not be said on the air.

The regulations do not prevent the licensees of radio stations from broadcasting any program they see fit; on the contrary, their primary purpose is to increase the freedom of the licensee to broadcast what he prefers without any restriction whatsoever. The regulations do interfere, to

[96] As originally filed, neither of the complaints contended that the regulations violate the First Amendment. CBS introduced that issue in an amendment to its complaint (CBS R. 48). The NBC complaint is still silent on this point.

some extent, with the station's freedom of contract, insofar as they prohibit contracts containing certain restrictive provisions, but the object of the prohibition is to maintain a competitive system under which freedom of speech will not be impaired.

That liberty of contract does not protect agreements which restrain competition is evidenced by numerous decisions under the Sherman, Clayton, and Federal Trade Commission Acts. Industries which are engaged in the dissemination of ideas and information are not exempt from these laws. Even "the publisher of a newspaper * * *, is subject to the anti-trust laws." *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 132–133; *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U. S. 268. If restrictive covenants in these industries may be forbidden under such statutes without violating the First Amendment, they may likewise be reached under the Communications Act.

Appellants attempt to avoid these principles by arguing that the First Amendment does not permit their effectuation by means of licensing. On this theory the entire Communications Act would be invalid. And yet it is clearly established that regulation of the radio industry through a licensing system is lawful. The nature of the radio spectrum requires that there be a limitation upon the number of broadcasting stations, and this differentiates the radio from other media for the expression of ideas.

It is contended that since the need for licensing arises from physical limitations, licenses can only be conditioned on factors relating to the physical problems of confusion and interference between stations. But the *Sanders* case,[7] upon which appellants rely, itself recognizes that "an important element of public interest and convenience affecting the issue of a license" is the service to the community rendered by an applicant, and points out that this requires consideration of an applicant's financial qualifications and the effect of competition (309 U. S. at 475–476). And the *Nelson Brothers* case[8] shows that the Commission legitimately considers the type of service rendered by stations, in additions to such matters as the elimination of interference (289 U. S. 270–273, 285).[9] These cases demonstrate that the Commis-

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[7] *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470.

[8] *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285.

[9] In fact, NBC and CBS themselves recognize that the Commission can consider questions of program service etc. by urging upon the Commission as reasons for granting or denying particular applications the quality of the service rendered by their stations (See e. g. Petition for Rehearing (pp. 6, 8–10) filed by National Broadcasting Co., against grant of Application of WJW, Inc. (File No. B2–P–3263); Notice of Appeal and Petition for Rehearing filed by National Broadcasting Co., against grant of application of Matheson Radio Company, Inc., (Transcript of Record on petition for certiorari, No. 585, this Term, pp. 10, 62); Application of Columbia Broadcasting System, Inc. (Docket No. 6024). Proposed Findings of applicant, p. 9).

sion may take into account other than physical factors in allocating or denying broadcasting licenses."[100]

It is thus clear that a regulation not concerned solely with physical matters does not, for that reason, violate the First Amendment. The guarantee of free speech, as embodied in the Constitution and Section 326, is impinged only by regulations which tend to interfere with a station's right to broadcast what it wants. The regulations in question here, although they may restrict a station's right to contract as it chooses, safeguard, rather than restrict, its freedom to broadcast what it chooses.

IV

THE DISTRICT COURT PROPERLY DECIDED THESE CASES UPON THE ADMINISTRATIVE RECORD WITHOUT FURTHER TRIAL

The district court granted the Government's motions for summary judgment, thus disposing of the cases on the basis of the administrative record

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[100] See *Heitmeyer* v. *Federal Communications Commission*, 95 F. (2d) 91 (App. D. C.), and cases cited; *Boston Broadcasting Co.* v. *Federal Radio Commission*, 67 F. (2d) 505 (App. D. C.). For cases in which renewal of a license was denied because programs previously broadcast were deemed contrary to the public interest, see *Trinity Methodist Church* v. *Federal Radio Commission*, 62 F. (2d) 850 (App. D. C.), certiorari denied, 288 U. S. 599; *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, 47 F. (2d) 670 (App. D. C.).

which was attached as an exhibit to the motions. Appellants urge (NBC Br. 91–98; CBS Br. 97–103) that the court should have required the Government to file an answer, and that the issues should then have gone to trial before the court; they do not, however, point to the particular evidence and facts, not already before the court, which should be permitted to be tried. The question presented, accordingly, is whether appellants are entitled to a trial *de novo*, or whether these cases are to be determined upon the basis of the administrative record.

Appellants concede, as they must, the normal rule to be that where hearing has been held before an administrative agency, the reviewing court must limit its inquiry to the record so made before the agency. *Tagg Brothers & Moorhead v. United States*, 280 U. S. 420, 433–445; *Acker v. United States*, 298 U. S. 426. Appellants nevertheless insist that the hearing held by the Commission was not of such a kind as to permit the application of the rule. Although this Court's holding with respect to the reviewability of the order here involved suggests the contrary,[10] appellants contend that the

[10] In this connection the court below said (NBC R. 527; CBS R. 489): "It would be futile after the expenditure of so much time and labor to hold that the proceedings were only advisory and concluded nobody; indeed, the mere fact that the regulations are 'orders' reviewable under § 402 (a) would seem to preclude such a conclusion. We do not understand the Supreme Court to mean that every minatory gesture of the Commission is reviewable under that section."

case must be opened and that the court must hear all the evidence relating to the regulations which the Commission has already heard. The appellants undertake a heavy burden to establish that such extensive duplication is required. We submit that they have not met the burden.

Since appellants predicate much of their argument on this branch of the case upon the type of hearing and the procedure afforded them, it is important to set out what happened. The pertinent facts are these:

On March 18, 1938, in Order No. 37, the Commission directed that an investigation be undertaken to determine what special regulations applicable to radio stations engaged in chain or other broadcasting were required in the public interest, convenience or necessity; the Order provided that inquiry be made into a number of specified subjects (NBC R. 27; CBS R. 36–37). These must be read in their entirety to appreciate how close they come to the subjects covered by the regulations finally issued. It is sufficient to note here that they included the contractual rights and obligations of stations engaged in chain broadcasting, contractual provisions for exclusive affiliation with a single network, network ownership of stations, the hours and time over the station affiliates which the networks control, the rights of stations to reject network programs, and practices and agreements in restraint of trade or furtherance of monopoly (NBC

R. 27; CBS R. 36–43). Copies of this Order were published (3 Fed. Reg. 37) and were mailed to every broadcasting station and network organization (NBC R. 28; CBS R. 38). On September 20 the Commission sent to the same parties a notice of hearing containing an itemized list of matters as to which the networks were to present evidence (NBC R. 447–449; CBS R. 38–42). The hearing was held before a committee composed of three commissioners (NBC R. 37; CBS R. 57). The national and regional networks, station licensees, and recording and transcription companies were invited to appear and present evidence. Other persons who requested an opportunity to appear were heard.

The testimony of the witnesses was under oath (e. g. Tr. 20), and was transcribed and embodied in the record. All testimony was, of course, subject to rebuttal. And although, as CBS points out in its brief (p. 99), the Commission originally indicated that cross-examination of witnesses would generally be by the committee and its staff, that questions to be proposed by the parties should be put through Commission officials, and that cross-examination by the other persons present would be allowed only when the committee decided that the ends of justice would be served (Tr. 13), this policy was not adhered to. The appellants prepared their cases and examined their own witnesses, who were then cross-examined by Commission counsel and thereafter offered for redirect examination by

network counsel. The appellants were permitted to cross-examine all persons called as Commission witnesses. In the course of the hearings counsel for CBS stated on behalf of CBS and NBC that they had fully availed themselves of the opportunity to place before the Commission all information necessary for an understanding of the problem prior to the making of any regulations (Tr. 8482–8483). Counsel for NBC stated during the hearings that where he had requested opportunity to cross-examine he had been accorded that right (Tr. 8486):

In all, the committee heard 96 witnesses on 73 days of hearings. Their evidence fills 27 volumes—8,713 pages of transcript and 707 exhibits. The greater part of the testimony and evidence at the hearings relevant to the regulations here attacked was prepared and presented by NBC, CBS, and Mutual. Twenty of the 96 witnesses were called by NBC; their testimony fills 3,225 pages of transcript. Seventeen witnesses appeared on behalf of CBS, whose testimony fills 2,180 pages of transcript. The testimony of eight witnesses for Mutual fills 670 pages of transcript. It is significant that the very contentions later urged in argument before the Commission, before the court below, and before this Court, relating to the desirability and reasonableness of the restrictions were urged by appellant networks *in the form of testimony at the hearings* (e. g. Tr. 1713; 1714–1716;

1792–1795; 1819–1820; 1852–1854; 2595–2598; 3443–3446; 3457–3459; 3462–3464; 3496–3499; 3718–3719; 8514–8518; 8520–8522; 8542–8544; 8545–8546).

On June 12, 1940, the committee submitted its report and on November 28, 1940, the Commission issued draft regulations in order to give scope and direction to the oral argument (NBC R. 133–138; CBS R. 153–158). These draft regulations, though different in detail, covered the same subjects as those finally adopted.

Thereafter extensive briefs were filed and oral argument presented before the full Commission. On May 2, 1941, the Commission issued its final report, together with an order adopting the regulations. In its Report, the Commission expressly stated (NBC R. 39; CBS R. 59):

> The views expressed and the regulations adopted herein are, we believe, fully supported by the evidence adduced at the hearings by the networks and other interested parties. With respect to such matters as the present allocation and ownership of particular broadcasting facilities, we have utilized our current official records. The historical data in the early chapters includes matters of common knowledge or of public record.

Before the regulations finally became effective, Mutual petitioned the Commission to amend two of them, and after additional briefs and oral argu-

ment and upon full reconsideration, on October 11, 1941, the Commission issued a supplemental report together with amendments to three of the regulations (NBC R. 201–217; CBS R. 20–36). The final paragraph of this report made clear the Commission's readiness to entertain other petitions for modification (NBC R. 212; CBS R. 31):

> The Commission stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances the chain broadcasting regulations should not be applicable to any particular situation.

We do not understand appellants to claim that these procedures which we have thus summarized deprived them of a fair hearing in the constitutional sense at all. Rather, they urge that since the procedures were not "quasi-judicial," they were not of such character as to entitle the administrative record to form the basis for judicial review, and appellants had, therefore, a right to a judicial retrial (CBS Br. 98–102; NBC Br. 91–94). Specifically, appellants urge that they are entitled to judicial retrial because of three asserted defects in the Commission proceedings which destroy the effect of the administrative record: (1) the notice;

(2) the evidence relied upon by the Commission; and (3) cross-examination. But in fact an examination of the proceedings before the Commission discloses that in none of these respects were the appellants deprived of adequate opportunities to present their own cases or to meet the cases against them.

As we have seen (*supra*, p. 123), the original order of investigation and the notice sent to the parties were fully informative and drew their attention to the very matters with which the regulations were ultimately concerned.[102] Indeed, the transcript itself establishes the adequacy of the notice. It contains not only the *facts* with respect to the contractual provisions and network practices dealt with by the regulations, but also appellants' justification, in testimonial form, of these provisions and practices (see *supra*, pp. 125–126). Nor is the notice itself the only source to which to look to establish that appellants were fully apprised of the issues in ample time to meet them. Following the extensive hearing, in the course of which the

[102] Compare the notice practice of the Interstate Commerce Commission in rule making. The Commission holds hearings prior to issuing general rules, but it does not announce in advance the text of the regulations. Rather, it merely states in advance the general object of the inquiry. E. g., Attorney General's Committee on Administrative Procedure, *Interstate Commerce Commission*, S. Doc. 10, 77th Cong., 1st sess., Part 11, p. 96; *Assigned Car Cases*, 274 U. S. 564; *Chicago, R. I. & P. Ry. v. United States*, 284 U. S. 80.

issues were further focused, the committee's report was issued and then a draft of the regulations followed (see *supra,* p. 126). Upon this report and the draft regulations there was oral argument before the Commission, in which all parties, including the Commission's counsel, participated. Even after the Commission's report, there was a reopening for the purpose of further argument, which led to a complete "reconsideration" by the Commission (NBC R. 201–203; CBS R. 20–22). And the supplemental report itself afforded the parties further opportunity—of which they did not avail themselves—to request changes (*supra,* p. 127). Plainly, in these circumstances, the notice was adequate and no prejudice occurred. Cf. *Morgan* v. *United States,* 304 U. S. 1, 19.

The same considerations foreclose appellants' argument based upon the Commission's alleged use of extra-record materials. Administrative utilization of "official" or judicial notice has been recognized as wholly proper, even in adjudicatory proceedings. See *Final Report of Attorney General's Committee on Administrative Procedure,* S. Doc. 8, 77th Cong., 1st sess., pp. 71–73. And official notice is particularly appropriate in rule making. See Attorney General's Committee on Administrative Procedure, *Interstate Commerce Commission,* S. Doc. 10, 77th Cong., 1st sess., Part 11, pp. 97–98. Here, the Commission expressly specified the facts of which it was taking

notice (*supra*, p. 126),[103] facts which were notorious, which were not denied, and which are not even now suggested to be in dispute. Further hearing was thereafter afforded; the parties were thus apprised of the action of the Commission and had full opportunity to argue whatever conflicting inferences may have arisen from them.[104]

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[103] Thus the procedure was precisely in accordance with that recommended in respect of official notice in the *Final Report*, *op. cit. supra*, pp. 72–73.

[104] In the same connection CBS (Br. p. 101) also objects to the Commission's consideration in its Supplemental Report of October 11, 1941, "of the testimony presented before the Senate Committee on Interstate Commerce, of the considerations presented at the conferences [with representatives of the networks themselves] which followed the hearings, and of the oral arguments presented at the hearing on Mutual's petition and of the briefs filed at that time * * *." As a result of these proceedings which culminated in the Supplemental Report, the reach of the original regulations was modified. This, of course, was beneficial to the appellants, and they do not suggest that they were in any way prejudiced thereby.

And, it is to be noted, the Senate hearings and Commission conferences were devoted not to the primary facts, but to considerations going to the Commission's ultimate judgment. In effect, therefore the Commission did no more than consider additional material of the type included in briefs and oral arguments. Indeed, this was precisely the way CBS itself treated this material. In its brief filed with the Commission on reconsideration (September 12, 1941), CBS included the statement made by its president before the Senate Committee (pp. 5, 15–83). In the light of this circumstance, CBS is not now in a position to urge that the Commission was in error in considering the very material which it embodied in a brief filed with the Commission.

Finally, the asserted restriction upon the right of cross-examination was at most purely formal (*supra*, pp. 124–125). And, in any event, cross-examination, which is vital only where, unlike the situation here, there is a dispute concerning facts may appropriately be limited in rule making proceedings. E. g., *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; Fuchs, *Procedure in Administrative Rule-Making* (1938) 52 Harv. L. Rev. 259, 278; Attorney General's Committee on Administrative Procedure, *Federal Communications Commission*, S. Doc. 186, 76th Cong., 3d sess., Part 3, pp. 78–79; *ibid.*, *Administration of the Fair Labor Standards Act*, 77th Cong., 1st sess., S. Doc. No. 10, Part 1, pp. 38–39; *ibid.*, *Interstate Commerce Commission*, S. Doc. No. 10, 77th Cong., 1st sess., Part 11, p. 97.

It is thus apparent that there was nothing in the procedures which the Commission adopted which vitiated the record or made it so meaningless as to require its disregard upon judicial review. Moreover, in appraising the adequacy of this procedure it must be remembered that the Commission was not here conducting a negligence case or an unfair labor practice case. A refusal to import without modification inappropriate procedural rules into a rule-making or "quasi-legislative" proceeding can scarcely justify ignoring the administrative record. We may assume that there can be a judicial trial *de novo* if there is no record,

in the usual sense, at all. Cf. *Borden's Farm Products* v. *Baldwin*, 293 U. S. 194. But here, we submit, the procedures were wise adaptations to the subject matter with which the Commission was dealing in view of the nature of the administrative action to be taken. And this Court, as well as administrative law commentators, have recognized that procedural requirements vary with the nature of the administrative task, and that the requisites of a hearing preceding administrative rule-making may differ from those preceding an adjudication. Cf. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; see Fuchs, *Procedure in Administrative Rule-Making* (1938) 52 Harv. L. Rev. 259, 264–265, 280; *Final Report of Attorney General's Committee on Administrative Procedure*, S. Doc. 8, 77th Cong., 1st sess., pp. 109–111; Attorney General's Committee on Administrative Procedure, monographs cited *supra*, p. 131.

Indeed the very procedural matters of which appellants complain are those which are peculiarly affected by the fact that the proceeding involves rule making and not adjudication. For, as stated by the Attorney General's Committee on Administrative Procedure in its *Final Report* (*op. cit. supra*, p. 109):

> The application of the procedures of a judicial trial to administrative rule making is limited, however, by the distinctive characteristics of rule making proceedings.

> The issues are normally complex and numerous; the parties may be diverse and not alignable into classes; the outcome will involve a judgment concerning the consequences of rules to be prescribed for the future and a discretion in devising measures to effectuate the policies of the statute. These factors differentiate these proceedings from the normal judicial trial in which adversary hearings are traditionally employed, and *accordingly limit the possibility of defining issues in advance, of addressing evidence to them, of permitting systematic cross-examination,* * * * [Italics added].

The touchstone, then, is not perfect conformity to the procedure of judicial hearings, but, broadly, its fairness as affording full opportunity to present relevant facts and arguments. That test was plainly met here. Examination of the transcript, the briefs filed with the committee, with the full Commission prior to the issuance of the regulations, and with the Commission upon reconsideration, demonstrate beyond doubt that the facts and the parties' contentions were fully litigated. The very arguments now advanced by appellants to establish that the regulations are unreasonable were advanced by them in testimony (*supra*, pp. 125–126) before the Commission, in oral arguments, and in the several sets of briefs. Despite the elaborate post-hearing procedures, the reopenings, and the invitations to come forward to propose further

modifications (*supra*, pp. 126–127), appellants at no time suggested that they wished additional evidence or argument. And, indeed, it is plain that there was no occasion for such a suggestion, for, as stated by appellant, CBS in its brief filed with the Commission on September 10, 1941, on rehearing (pp. 4–5):

> We have *repeatedly maintained* that the regulations are arbitrary, unreasonable and contrary to the purposes of the Act. * * *
>
> In the face of *competent and expert testimony as to the foreseeable destructive effects of these regulations* on overall network service, the Commission offers [no] real justification for the assertion that exclusive affiliation or time options or contracts for more than one year have adversely affected the program service of the stations, their prosperity, or the service rendered to the public. * * *
>
> We reaffirm earnestly and seriously that the Commission has not considered completely and thoroughly the probable consequences of its rules to network broadcasting and to broadcasting generally. *We suggested these considerations in our brief and oral argument to the Commission prior to the adoption of the rules.* [Italics added.]

And, as we have noted (*supra*, p. 125), CBS's counsel stated at the Commission hearings, in behalf of CBS and NBC that they had fully availed themselves of the opportunity to present the Com-

mission with all information necessary to an understanding of the problem prior to the promulgation of any regulations. The issues, therefore, were fully canvassed and recanvassed before the Commission. In the light of these circumstances, of the fact that appellants never indicated before the Commission that they did not have full opportunity to present testimony, or meet the issues raised, and of the fact that appellants do not even now come forward to specify what new facts, not before the Commission, they wish to show, appellants are scarcely in a position now to insist that they are entitled to a hearing *de novo* in the court below.

Indeed, the controversy between the parties is not concerning the primary facts giving rise to the regulations;[105] it concerns only the ultimate issue of their effect and their wisdom (see CBS complaint, paragraphs 6 and 10; NBC complaint, paragraphs 25, 36, 38, and 40). In support of their allegations, appellants presumably would offer expert testimony to show that the regulations would result in less efficient network operations, or diminished ability to compete with other advertising media (CBS complaint, par. 6), lower quality public service (*id.* par. 10; NBC complaint, par. 25), and the disruption of the ordinary course of network

[105] In fact, NBC appears to concede (Br. 95) that the record is complete as to "exposition" if not "defense."

business (NBC complaint, pars. 36, 38, and 40) and would generally be inconsistent with the public interest. Yet these are the very considerations which must be, and have been, addressed to the Commission; they are conclusionary issues for it to resolve, and it has resolved them.

Moreover, it would be futile to permit appellants to introduce evidence to support these allegations before the court; such evidence would be of no assistance to the court. Its only function is to inquire whether there is a reasonable basis for the Commission's regulations, or stated another way, whether the regulations have a rational relationship to the permissible statutory objectives (*supra*, p 79). The reviewing court has all the necessary materials at hand, embodied in the transcript, to perform this function. It cannot be aided by a new parade of witnesses who may testify in support of the appellants' allegations. As the court below observed (NBC R. 531; CBS R. 492–493)—

> * * * if the evidence went to contradict or overthrow the findings, we could not bring it into hotchpot with the evidence taken by the Commission, without deciding the issues in the first instances ourselves. We have no such power; it would upset the whole underlying scheme of an expert commission, whose orders must stand or fall upon such evidence as it had before it.

Thus even if the weight of the evidence adduced at the trial *de novo* should support the appellants' allegations, and the court could assimilate such testimony to the material which was before the Commission, it could not rely on "testimony and prophecies and impressions of expert witnesses" to supplant the Commission's judgment, "even in the face of convincing proof that a different result would have been better." *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570, 576; *ibid.*, 310 U. S. 573, 585. For, as stated by this Court, to allow administrative "findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal" as the rule-making body. *Tagg Brothers & Moorhead* v. *United States*, 280 U. S. 420, 444.

Nor is there any reason to reach a contrary result, as appellants appear to suggest (NBC Br. 91; CBS Br. 98), because the Commission may not have been *required* to hold the instant hearings. The fact, as we have seen, is that a full and fair hearing *was* held. If, in fact, the administrative agency does hold a hearing prior to its promulgation of regulations, precisely the same reasons of accommodation between the administrative and the judicial processes preclude a trial *de novo*, whether or not such hearings happen to be required by statute.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

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APPENDIX

Excerpts from the Communications Act of 1934, as amended:

SECTION 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a Commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

* * * * *

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a per-

son engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

* * * * * *

(p) "Chain broadcasting" means simultaneous broadcasting of an identical program by two or more connected stations.

* * * * * *

SEC. 4. * * * (i).

* * * * * *

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publications of records or proceedings containing secret information affecting the national defense.

* * * * * *

SECTION 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right,

beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * *

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity require, shall—

* * * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to

prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * * *

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * * * *

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

* * * * *

(d) No license granted for the operation of a broadcasting station shall be for a longer

term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

* * * * * *

SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: *Provided, however,* That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided, further,* That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the

station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

* * * * * *

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a

statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

SEC. 310. (a) The station license required hereby shall not be granted to or held by—

(1) Any alien or the representative of any alien;

(2) Any foreign government or the representative thereof;

(3) Any corporation organized under the laws of any foreign government;

(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by a foreign government or representative thereof, or

by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

Nothing in this subsection shall prevent the licensing of radio apparatus on board any vessel, aircraft, or other mobile station of the United States when the installation and use of such apparatus is required by Act of Congress or any treaty to which the United States is a party.

(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.

SEC. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrange-

ments, or by any other means, or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation.

SEC. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That

such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

SEC. 314. After the effective date of this Act no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy; communications; or signals by radio in accordance with the terms of the license issued under this Act, shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiv-

ing for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.

* * * * * *

U. S. GOVERNMENT PRINTING OFFICE 1943

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CHARLES ELMORE CROPLEY
CLERK

Nos. 554–555

In the Supreme Court of the United States

OCTOBER TERM, 1942

NATIONAL BROADCASTING COMPANY, INC., AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., APPELLEES

COLUMBIA BROADCASTING SYSTEM, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., APPELLEES

RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 554

NATIONAL BROADCASTING COMPANY, INC., AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., APPELLEES

COLUMBIA BROADCASTING SYSTEM, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., APPELLEES

RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER

These suits were brought in a statutory three-judge district court to enjoin the enforcement of the Federal Communications Commission's regulations to radio stations engaged in chain broad-

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casting (NBC, R. 1–18; CBS, R. 1–12). The court below, on November 16, 1942, granted the Government's motions for summary judgment and dismissed the complaints (NBC, R. 522–532; CBS, R. 483–493). In dismissing the complaints, the court below issued an order restraining the enforcement of the regulations until February 1, 1943, or until argument of the appeal in this Court, whichever should be earlier (NBC, R. 532–534; CBS, R. 493–495). On January 19, 1943, the Commission adopted a minute suspending the effective date of the regulations under April 1, 1943, or the decision of this Court, whichever is earlier.

Appellants have now filed motions asking this Court to enter an order restraining the enforcement of the Commission's regulations until ten days after the filing of the mandate in the district court. By these motions, appellants seek three things which have not already been granted to them by the Commission's minute:

1. In the event this Court does not dispose of these appeals before April 1, 1943, they seek an order which will restrain enforcement of the Commission's regulations until the decision of this Court.

2. In the event the judgments are reversed, they desire to be protected by an injunction until the cases can be returned to the district court for further action.

3. In the event this Court affirms the decrees below, they seek a stay until 10 days after the filing in the court below of this Court's mandate, in order to give them "a reasonable opportunity to make whatever arrangements are necessary" with their affiliated stations.

We do not oppose appellants' request for a stay beyond April 1, 1943, in the event that these appeals are not decided by that date. Nor do we oppose the granting of a further stay hereafter if this Court should reverse the decrees of the court below.

We do, however, oppose appellants' request for a stay until ten days after the filing of this Court's mandate in the court below in the event that the judgments below are affirmed. The affirmance of the judgments below will constitute a holding by this Court that the Commission had authority under the statute to adopt the regulations, and that the regulations are valid. If appellants, in the face of such a holding, desire further time within which to comply with the regulations, we submit that the proper initial forum for such a request is the Federal Communications Commission.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

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IN THE

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OCTOBER TERM, 1942.

Nos. 554-555.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Appellants*

v.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., *Appellees.*

COLUMBIA BROADCASTING SYSTEM, INC., *Appellant,*

v.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC., *Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF MUTUAL BROADCASTING SYSTEM, INC., APPELLEE.

LOUIS G. CALDWELL,
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Counsel for Appellee.

February 3, 1943.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

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NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Appellants*

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF MUTUAL BROADCASTING SYSTEM, INC., APPELLEE.

INTRODUCTORY.

The opinion below, jurisdiction of the Court, questions presented, statutes involved, and statement of the case are sufficiently set forth in the Government's brief and need not be repeated by us.

We agree in general with the arguments advanced in the Government's brief with respect to the issues presented on these appeals. These questions are as follows:

1. Whether the Federal Communications Commission (hereinafter referred to as the Commission) has power under the Communications Act of 1934, 47 U. S. C. A., Secs. 151 *et seq.*, to promulgate the regulations in issue.

2. Whether the Communications Act of 1934, as construed by the Commission, or Regulations 3.101 to 3.108, inclusive, contravene Article I, Section 1 of the Constitution of the United States or the Fifth Amendment to the Constitution.

3. Whether the three judge statutory court from which these appeals are taken should have dismissed the complaints without holding a trial.

4. Whether the regulations of the Commission are arbitrary and capricious.

The discussion of these questions in the brief for the Government, we believe, adequately disposes of the contentions urged upon this Court by the appellants. However, as we have had over eight years experience in the operation of one of the four nationwide broadcasting networks in the United States and are one of the parties in interest vitally affected by the regulations of the Commission, we feel that we can be of most assistance to the Court if we discuss only the last question, namely, whether the regulations are arbitrary and capricious.

THE REGULATIONS OF THE COMMISSION ARE NOT ARBITRARY AND CAPRICIOUS.

1. Description of Mutual Broadcasting System, Inc.

Mutual Broadcasting System, Inc. (referred to hereinafter as Mutual) had its inception in the fall of 1934, at which time the two existing national network companies (National Broadcasting Co., Inc. and Columbia Broadcast-

ing System, Inc., referred to as National and Columbia, respectively), operating three different network systems[1], had already established themselves and been in business for approximately eight years.

Starting with a group of four broadcast stations located in New York, Chicago, Detroit and Cincinnati, Mutual has expanded to a nationwide basis, having associated with it on November 1, 1941, 190 broadcast stations in the United States, Canada, Alaska and Hawaii (R. 267).[2] While this number is larger than the number of stations affiliated with each of the other networks, actually in terms of effective use as outlets for network programs, Mutual is under severe handicaps due to the restrictive provisions of contracts held by the other network companies, and in particular, the exclusive option-time provision and the network exclusivity clause. Many of Mutual's affiliates are also affiliates of National, Columbia, or the Blue Network Company, Inc., and their use by Mutual is subject to cancellation in the event of the exercise on twenty-eight days' notice of option rights by the other network companies. In a large number of important cities Mutual is effectively barred from entry on any terms as a result of Columbia's contracts with stations which prohibit them from carrying programs of another network. During and before 1941, National also had network exclusivity provisions in contracts with many of its affiliates, and the effect of such clauses, together with similar clauses in contracts between stations and Columbia, barred access by Mutual to many of the larger cities in

---

[1]National Broadcasting Company, Inc. was formed in 1926 and during the time this cause was heard by the Commission, it operated two nation-wide networks, the Red and the Blue. The Blue Network Company, Inc. was formed after the commencement of this suit to operate the Blue Network (National's brief, p. 5). Columbia Broadcasting System, Inc. was formed in 1927 and operates the Columbia Network.

[2]All record references in this brief, unless otherwise indicated, apply to the record in National's case, No. 554.

which advertisers and advertising agencies desired network programs to be broadcast. However, after the inception of these proceedings by the Commission and prior to the time the cause was first heard by the three judge statutory court, National abandoned its network exclusivity clauses in its contracts with affiliates. Such abandonment occurred at the end of 1941 (R. 279; National's brief, footnote pp. 10 and 11).

Relatively few Mutual affiliates are stations of high or medium power with large coverage. Many of the stations operate with low power and have a very limited coverage. A comparison of the facilities of broadcast stations affiliated with the four national networks as of November 1, 1941, in terms of power and hours of operation is found in Mr. Weber's affidavit (R. 318-319). Whatever changes have occurred since that time do not materially alter the picture.[3]

Significance is attached by National to the fact that the stock in Mutual is owned by broadcast stations and by regional networks, behind two of which stockholders "stand the Chicago Tribune and R. H. Macy and Company, whose assets far exceed those of NBC or CBS and are not dependent upon the fortunes of network broadcasting" (National's brief, p. 14). It is further stated in National's brief (p. 14) that the responsibilities and liabilities of a network organization (like wire line costs and the obligation of furnishing a continuous schedule of sustaining programs) are not undertaken by Mutual, and that:

> "As a network organization, MBS is little more than a switchboard for the routing of the programs of its stockholders and affiliates and network programs to the stations on the MBS network" (National's brief, pp. 14 and 15).

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[3] Obviously, the facilities, number and network connections of broadcast stations change from time to time, but as these cases are here on appeal, the transcripts of record, unless otherwise indicated, provide the basis for all statements of fact.

In view of these references to Mutual's corporate organization and methods of operation, we shall devote a few words in an effort to make the matter clear.

Mutual is an Illinois corporation with its principal office in Chicago (R. 265). On December 11, 1941, it had outstanding a total of 99 shares of common stock, the only kind of stock either authorized or outstanding. Its stock is not widely distributed, and in December, 1941, it was owned by seven stockholders, each of whom owned and operated broadcast stations and two of whom operated regional networks, as follows (R. 265):[4]

Shareholder	Number of Shares	Call Letters of Station or Stations	Location of Station
WGN, Inc.	25	WGN	Chicago, Ill.
Bamberger Broadcasting Service, Inc.	25	WOR	New York, N. Y.
Don Lee Broadcasting Co.	25	KHJ	Los Angeles, Cal.
		KFRC	San Francisco, Cal.
		KGB	San Diego, Cal.
		KDB	Santa Barbara, Cal.
Colonial Network, Inc.[5]	6	WAAB	Boston, Mass.
		WNAC	Boston, Mass.
		WEAN	Providence, R. I.
		WICC	Bridgeport, Conn.
United Broadcasting Co.	6	WHK	Cleveland, O.
		WCLE	Cleveland, Ohio.
		WHKC	Columbus, O.
Cincinnati Times-Star Co.	6	WKRC	Cincinnati, O.
Western Ontario Broadcasting Co., Ltd.	6	CKLW	Windsor, Canada (in the Detroit area).

[4] Since December 11, 1941, four new stockholders have been added, each of whom owns and operates a broadcast station. The stations are located in Philadelphia, Pittsburgh, Baltimore and Buffalo. With the addition of these stockholders, the amount of stock outstanding has been increased from 99 to 142. Two of the old shareholders had their stockholdings increased from 6 to 13½; two of the new stockholders received 6 shares each and the other two received 8 shares each.

[5] Colonial Network, Inc., was not the licensee of the four stations set opposite its name. The licensee of those stations was Yankee Network, Inc., a corporation owned by the same interests.

The expenses of Mutual's operation are obtained through monies derived (1) from commissions retained out of sums received from advertisers and others for the use of time over stations affiliated with the Mutual network, together with specific contributions from shareholders and affiliates for wire line expenses, and (2) from contributions from Mutual's stockholders fixed in accordance with contracts between them and Mutual.

The two stockholders referred to in the preceding quotation from National's brief are actually WGN, Inc., the licensee of Station WGN in Chicago, and Bamberger Broadcasting Service, Inc., the licensee of Station WOR at New York. WGN, Inc. is a subsidiary of the Tribune Company. Bamberger Broadcasting Service, Inc. is a subsidiary of L. Bamberger and Company, which in turn is a subsidiary of R. H. Macy and Company. Both the Tribune Company and R. H. Macy and Company have, of course, substantial assets, although the record is silent on the subject.

National is a subsidiary of the Radio Corporation of America. The Blue Network, Inc. also is a subsidiary of the Radio Corporation of America (National's brief, p. 5). The parent corporation has enormous assets, the exact figure not being shown in the record, and is engaged, either directly or through subsidiaries, in a variety of enterprises other than broadcasting. It is difficult to see how the statement in National's brief concerning the assets of the parent corporations of two of Mutual's stockholders contributes anything to a determination of the issues herein involved.

Mutual, while in form a corporation for profit, is actually a cooperative enterprise. It pays no dividends and has no profits. The status of stockholders affords them certain advantages in that stockholders have a voice in the formation of network policies and a corresponding degree of independence from arbitrary control. Financially, however, the status involves a heavy responsibility in underwriting and contributing not only the expenses of operation but, particularly in the case of the larger stockholders,

the sustaining program service, together with studio facilities, engineering staffs and other items incidental to the operation of the key stations of the network.

The mechanics involved in the operation of the Mutual Network do not differ materially in character from the mechanics involved in the operation of the other three national networks. Like its competitors, Mutual is engaged in the operation and in performing all the functions of a national network organization. Mutual supplies to its affiliates a daily network program service consisting of both commercial and sustaining programs and totaling more than 112 hours a week over a system of telephone wire lines (R. 268). Frequently, additional hours of program service are supplied, including on some occasions service throughout the 24 hours of the day for the covering of events of major importance. Thus, the network program service supplied by Mutual is substantially the same in character, content, quantity, quality, and expense of production as the network program service supplied by the other three network companies, differing only as would be naturally expected of a newer organization having a smaller volume of business and suffering from obstacles imposed upon its operation by the restrictive contracts which the Commission's regulations would prohibit.

Telephone wire lines are continuously available to Mutual for the transmission of network programs from the places of origination to the stations. The total mileage of the telephone circuits was approximately 15,000 miles in 1941 and the annual cost of leasing these wire lines was $1,200,000 (R. 268). These wire lines are, for the most part, leased directly from the Telephone Company by Mutual, but, in some instances, are secured by virtue of arrangements between Mutual and certain of its shareholders and affiliates who in turn lease the wire lines from the Telephone Company. The cost of the wire lines leased by Mutual compares favorably with those leased by the other three network companies. According

to the affidavit of Mr. Trammell, president of National (R. 235), National's wire line expenses in 1940 aggregated in excess of $3,600,000 for *two* national networks, and in the affidavit of Mr. Paley, president of Columbia (No. 555, R. 229), it is stated that Columbia's costs for wire lines amount to over $2,000,000 a year. Both of these figures, however, apparently include the cost of special, local or temporary lines, in addition to those used regularly as part of the network.

With regard to network commercial programs, like its competitors, Mutual sells time on the stations comprising its network to advertisers. Such sales are usually made through independent advertising agencies or through sales organizations maintained by Mutual's stockholders or affiliates. Because Mutual is a younger network, and, more particularly, because of the obstacles created by the restrictive contracts of the other networks, Mutual has not been able to, and does not provide, as great a volume of network programs to its affiliated stations as do its competitors, but there is otherwise no substantial difference in the commercial network service supplied by Mutual and that supplied by its competitors.

Like its competitors, most of Mutual's network commercial programs are produced and paid for by the advertising agencies. Those not so produced are, in the case of Mutual, produced principally at the stations and by the staffs and facilities of Mutual's shareholders, located chiefly in the larger cities, in the same manner as are the programs of Mutual's competitors produced by their key stations.

With regard to the network sustaining programs, like its competitors, Mutual is engaged in the business of supplying a continuous sustaining program service to all of its affiliated stations. The sustaining program service consists largely of educational, cultural, musical, news and special events programs, and such program service exceeds 84 hours weekly (R. 269). Mutual's sustaining program service differs from its competitors in that such programs are

produced not by Mutual as a separate corporation, but by its shareholders and affiliates located principally in New York, Chicago and Los Angeles, but also located in the other cities throughout the country. The sustaining program service also differs in that it is probably larger in volume because the amount of network commercial programs available to the Mutual affiliates is smaller than the number of network commercial programs broadcast by the other networks. Mutual's sustaining programs are selected by competent program personnel from all of the available programs produced by stations affiliated with the network organization.

The cost of producing such sustaining programs compares favorably with the sustaining program costs of the other national network companies (R. 270). The studios, staffs and equipment of Mutual's principal stockholders serve substantially the same purpose and perform substantially the same functions as the key stations of the other national networks. Mutual believes that the advantages of its type of program service are that (1) stations affiliated with it in all parts of the country are encouraged to produce outstanding sustaining programs in order that such programs might be broadcast nationally; (2) through the system of compensation used by Mutual, which system will be described later, funds are provided to shareholders and affiliates for this purpose instead of being retained by the network corporation; (3) a large amount of diversification of program origination points is obtained; and (4) the tendency toward the concentration of talent in the large production centers is lessened.

Unlike its competitors, Mutual as a corporation does not own or operate any broadcast stations. However, the stations operated by its stockholders, principally those in Los Angeles, Chicago and New York, and to some extent its other shareholders and a number of its affiliates, perform the same function as the key stations on the other networks. Mutual's stations in the large production centers have

comparable studio, engineering and program facilities as do the key stations of its competitors.

Mutual's method of compensation to stations on the network differs materially from the system employed by the other network companies. Mutual does not fix the rates charged advertisers for network commercial programs. Such rates are merely the sum total of the individual rates charged by all of the stations accepting and broadcasting the program. Of the sums received from advertisers and others, Mutual retains a commission determined in advance by contract between it and the affiliate, which, in the normal case, is either large enough to include, or is supplemented by, the affiliate's share of Mutual wire line expenses, and in the case of shareholders, Mutual also retains each shareholder's agreed contribution toward the expenses of operation. Thus, Mutual pays to its affiliates a larger proportion of the sums received from advertisers than do Mutual's competitors.

Before February 1, 1940 Mutual's contracts with its affiliates (with a few exceptions) did not contravene the Commission's regulations. However, since that date, as is set forth in the Commission's Report, Mutual executed contracts with its shareholders and with one or two of its affiliates containing network exclusivity provisions and also exclusive time options (from 3¼ to 4¼ specified hours on week days and 6 hours on Sundays). These contracts are not consistent with the Commission's regulations at issue in these proceedings, but the contracts expressly provide that these clauses shall be terminated in the event the regulations become effective or in the event Mutual's competitors voluntarily abandon similar clauses, whichever occurs the sooner (R. 273).

2. The Restrictive Features in the Contracts between Mutual's Competitors and their Affiliates Effectively Stifle Competition.

The restrictive provisions in the network affiliation contracts executed by Mutual's competitors have caused and are causing Mutual irreparable injury. By reason of the limited number of broadcast stations available in cities throughout the United States, such restrictive provisions prevent Mutual from obtaining equal access to many markets and effectively bar Mutual from any access to a large number of important cities. The most important of these restrictive provisions are as follows:

1. Provisions by which the affiliate agrees not to broadcast the programs of any other network organization.[6]

2. Provisions by which the affiliate grants to the network organization an exclusive option, exercisable on 28 days' notice, either on all its hours of operation or on its more desirable hours in the morning, afternoon and evening periods.

3. Provisions by which the term of such contracts is fixed at a period of five years or more.

Also, the ownership by the other networks of broadcast stations in certain cities having less than four full-time stations has the same restrictive effect as the foregoing contract provisions.

The primary reason why such restrictive contracts have a stifling effect upon Mutual or any other network company which might desire to enter the business is the limited number of full-time broadcast stations available in the markets that advertisers desire to reach. As of November 1, 1941, there were 877 broadcast stations in licensed opera-

[6] As already stated, National has abandoned such exclusive provisions in its contracts with affiliates (National's brief, footnote pp. 10 and 11). However, virtually all of the contracts between Columbia and its affiliates contain network exclusivity provisions (R. 278).

tion in the United States (R. 280). Many of these stations are, however, unsuitable for network outlets due to (a) their non-commercial character; (b) restrictions on their hours of operation; (c) inadequate coverage to serve the cities in which they are located; (d) their location in towns too small to attract advertisers or (e) their locations within areas already served by four or more stations.

As of November 1, 1941, there were only approximately 21 cities adequately served by four or more full-time broadcast stations (R. 280). Of the remaining cities, approximately 24 were adequately served by three full-time broadcast stations; 59 were adequately served by two full-time broadcast stations; and, of cities having a population over 50,000, 44 were adequately served by only one full-time broadcast station. A list of cities as of November 1, 1941, classified according to the number of full time stations located therein and also according to the number of full time stations from which such cities receive adequate service is set forth in Mr. Weber's affidavit (R. 309-317).

Many of the cities adequately served by only three full-time stations, some of the cities adequately served by only two full-time stations, and a few of the cities adequately served by only one full-time station, are of large or substantial population, or are the centers of recognized trade areas, constituting attractive markets for national advertisers. Because of technical reasons, it is, generally speaking, impossible in the present or any immediately foreseeable future state of the art to provide additional full-time stations in such cities.

With four national networks in operation, the effect of the contract provisions above described is that in any city having less than four full-time stations, at least one of the networks is either entirely or largely barred from access for its program service to the city and its environs, and from offering coverage of the city and its environs to any national advertiser, depending on the type of restrictive provisions in effect with respect to the stations serving such

city. Similarly, the listening public in any such city is either entirely or largely barred from access to the program services of such network or networks. A compilation as of November 1, 1941 of cities having a population of 50,000 or more in which Mutual had not access, or only a limited access, was contained in Mr. Weber's affidavit at R. 341-342.[7]

In order to have equal opportunity in securing commercial network programs for national advertisers, a national network organization must be able to offer, on a footing substantially equal to that of its competitors, (a) access to the markets desired by such advertisers, and (b) assurance of the continued broadcasting of the advertisers' programs at the desired and scheduled time in such markets. Inability in either respect necessarily results in a preference for, and a choice by, national advertisers of other national network organizations not thus handicapped, both in originally placing their business and in continuing business already placed.

Many cities are of such importance (including a number of cities adequately served by less than four full-time stations) that the inability of one network and the ability of a competing network to afford access thereto on a continuous basis to a single such city will usually determine the choice of the advertiser. Other cities, also including a large number adequately served by less than four full-time stations from which Mutual is effectively barred equal access, are of sufficient importance so that, while such access to a single such city may not determine the advertiser's choice, access to two, three or a larger number of such cities, depending on their importance and their appeal to the particular advertiser, will determine his choice. The choice by an advertiser of one network

[7] As already indicated, from time to time changes occur in station assignments and network affiliations, as well as, in some instances, in the number of full-time stations available for network affiliation, but such changes as have occurred have not affected materially the situation.

over another for such reasons results in loss of revenue for the latter network and its affiliates not only with respect to the markets to which the losing network does not have such access but also with respect to all other markets in which it does have such access, as well as a loss of prestige with both advertisers and advertising agencies.

Specific illustrations of the loss of business by Mutual because of restrictive contracts between competitive networks and their affiliates were contained in Mr. Weber's affidavit (R. 289-298). As long as such restrictive contract provisions remain in force, it is impossible for Mutual or any new network company to compete on an equal basis with its older competitors.

3. The Regulations Adopted by the Commission are Reasonable and Will Not Destroy Network Broadcasting.

The primary regulation objected to by appellants is Regulation 3.104, which regulation prohibits the exclusive option-time provision. The nub of the present controversy revolves around this regulation.

Columbia argues that Regulation 3.101, the provision prohibiting network exclusivity clauses, is arbitrary and capricious and taken together with Regulations 3.102 and 3.104 would "destroy the network as a joint enterprise * * *" (Columbia's brief, p. 11). The answer to this argument, however, is plain. National has voluntarily abandoned the network exclusivity provision in its contracts with affiliates and no apparent injury has been caused to its network or to the network system of broadcasting.

Regulation 3.102, having to do with station exclusivity, obviously cannot operate to the injury of a network and is included in the contract only for the alleged protection of the affiliates. There is no serious argument presented that the outlawing of station exclusivity clauses is arbitrary and capricious.

Regulation 3.103 limits affiliation contracts to a period of two years, the period of time that the Commission issues

licenses to broadcast stations. This regulation prohibits networks from tying up stations for long periods of time and thus opens the door to effective competition. Obviously, the regulation is based upon sound public policy, and appellants apparently do not seriously contend that the system of network broadcasting cannot exist in the face of this regulation.

Regulation 3.105, having to do with the affiliate's right to reject network programs, is no more than a reiteration of appellants' present policies. Regulation 3.106 concerns network ownership of stations, and the regulation expressly provides that its effective date will be extended from time to time in order to permit the orderly disposition of properties.

Regulations 3.107 (having to do with the operation of two networks by one organization) and 3.108 (permitting affiliates to fix their own rates on non-network commercial programs) do not affect Columbia at all. Moreover, the effective date of Regulation 3.107 has been suspended indefinitely and will not be put in effect upon less than six months' notice. Since the proceedings in this cause were instituted, National has disposed of the Blue Network to the Blue Network Company, Inc., but it should be noted that the Blue Network Company, Inc. is also a wholly owned subsidiary of the Radio Corporation of America (National's brief, p. 5). At the present time, therefore, there is no effective separation of the two networks. The clause in affiliate contracts permitting National to fix affiliates' rates on non-network commercial programs has apparently been discontinued by National and therefore Regulation 3.108 will not have any injurious effect.[8]

Regulations 3.101 and 3.104, forbidding network exclusivity of stations and restricting the use of option-time, cannot have any appreciable adverse effect on either National or Columbia in any city adequately served by four

[8] Hearings before Senate Committee on Interstate and Foreign Commerce, S. Res. 113, 77th Cong., 1st Sess., p. 462.

or more full-time stations. In each such city, each of the four national networks already has its regular full-time affiliate, and there will be no occasion or tendency on the part of any one of these networks to attempt to make use of a station affiliated with any of the others.

No adverse effect can result to National or Columbia from the limitation of network option-time to three hours per segment. The Commission's division of the day into four segments (8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m. and 11 p. m. to 8 a. m.) corresponds as nearly as is practicable, without undue complications of detail and with due regard for differences in time zones across the country, to the recognized and generally accepted listening habits of the public, the evaluation of the hours of the day as to relative desirability from the point of view of advertisers and the various classes thereof, and the needs for time on the part of non-network advertisers, for sustaining programs, and for purposes of programs of a local and regional character. The reservation by the Commission of anything over three hours in each segment free from network option corresponds very closely with actual practice in the case of those networks having the largest volume of network commercial programs, namely, National's Red Network and Columbia, and their affiliate stations. While in a few segments per week, one or the other of these networks may have slightly over three hours in actual use on some evenings on some (but by no means all) of their affiliate stations, the average actual use is substantially less than three hours per segment, and in those few instances where it is not, nothing in the Commission's regulations prevents the continuance of such use under existing contracts with advertisers, or, with the consent of the stations involved, the renewal of such contracts.

Nor can there be any adverse effect upon National or Columbia from the prohibition of option-time clauses which are exclusive against other networks. The obstacles to the instantaneous transmission over wire lines of network pro-

grams to all parts of the country consist primarily in the scheduling of individual stations of *non-network* programs at various hours and in the absence of provisions for clearance of time against such programs make it necessary for the network to consult stations for clearance of the time desired for a particular network commercial program. Such obstacles are by no means insuperable, as has been demonstrated by the operation of the Mutual network without option-time from its establishment in the fall of 1934 until early in 1940, and even since then with respect to a large number of its affiliates, as well as by the operation of National's networks without option-time to any substantial degree until after 1935. Regulation 3.104, however, permits option-time affording adequate and entirely sufficient clearance for three hours per segment against all such obstacles.

By reason of their large existing use of the more desirable hours in each segment, the fact that existing contracts with advertisers are not disturbed by the regulations, and the fact that each affiliate will desire to, and will, obtain first call upon the programs of any network with which it is affiliated, neither National nor Columbia can possibly suffer any appreciable adverse effect from the restriction under discussion. Their respective affiliates in cities having less than four full-time stations will desire to remain their affiliates and to have first call on their programs.

As for the Blue Network Company, Inc., it may be adversely affected in that in cities served by less than four full-time stations, with respect to those hours which it now has under option but has not been able to sell to any advertiser, it will (if the regulations go into effect) henceforth be deprived of its power to prevent its affiliates in such cities, at their discretion, from accepting and assuring the continuous broadcasting at the scheduled hour of network commercial programs provided by another network. In other words, the Blue Network Company, Inc. will be unable to exploit network option-time as a device to prevent or eliminate competition by another network, as

distinguished from the legitimate purpose of option-time to provide simultaneous clearance over a number of stations as against non-network programs.

The prohibition against exclusive options will neither introduce nor lead to any appreciable confusion, difficulty in clearance, or necessity for negotiating with a number of stations as a prerequisite to entering into a contract with an advertiser. Each national network organization knows, and continuously maintains up-to-date information on, the use made by each of its affiliates of all time likely to be in demand for network commercial programs, and, in the case of cities adequately served by less than four full-time stations in which its affiliate may be serving also as the affiliate for another network; knows, and continuously maintains up-to-date information on, all time used over the station by the other network. Since most of the more desirable hours, particularly in the evening, are already in use over the networks of National and Columbia, in most instances the competition will be reduced to being between the Blue Network Company, Inc. and Mutual, each of which endeavors to provide the advertiser with access to the markets desired by him and in so doing offers access to the same stations in many cities adequately served by less than four full-time stations. Once the time in question over these stations is sold to the advertisers by one of these networks, it is, of course, unavailable over these same stations to the other network for the period of the contract with the advertiser (in the absence of exclusive option-time provisions in favor of the other network), but this is no more a disadvantage to one network than to the other. If it be deemed an injury to one network, it is relatively slight and is more than counterbalanced by the benefit to the affiliated stations and their audiences, and by the benefits resulting from active and fair competition on the merits of the competitors.

Appellants argue that if the regulations go into effect the tendency will be to create a super-network of the high-power stations throughout the country. The picture is presented

of a "super-network" of 64 stations covering the various markets that advertisers desire to reach (Affidavit of Mr. Trammell and Exhibit I attached thereto (R. 248-250)).

Appellants overlook the fact that of the 49 50 kw. clear channel stations in the United States, 21 are affiliated with National, 20 with Columbia, 6 with the Blue Network Company, Inc., and 2 with Mutual. Indeed, practically all of the 64 stations referred to by Mr. Trammell are at the present time affiliated with the Red Network of National or with Columbia's network. In most cities where one of these two networks has the better station, the affiliate of the other is so close in desirability that there is little choice between them. Thus, at the present time we have two such super-networks.

4. The Commission's Findings are Supported by the Evidence.

The court below expressly held that the findings of the Commission as announced in its Report were supported by substantial evidence, and plainly the court could come to no other conclusion. The Commission held a long and protracted hearing for approximately six months, giving National and Columbia full opportunity to present all of the evidence that they desired. After the evidence was all in, the Commission made elaborate findings to the effect that the regulations were necessary in the public interest, convenience or necessity, and these findings have an adequate and sufficient basis in the record, particularly in view of the results which the restrictive contract provisions produce. As the court below said,

> "* * * It is now hornbook law that the conclusions of such tribunals are not to be disturbed except in the plainest case" (R. 530).

The Commission's brief adequately summarizes the pertinent and relevant portions of the testimony and we shall not attempt to repeat such testimony here.

In *Board of Trade* v. *United States*, 314 U. S. 534, this Court readily recognized that only in exceptional cases should it interfere with the determinations of judgment made by the Interstate Commerce Commission, the expert body to which Congress has delegated the duty of administering the law. The expressions made in the opinion of this Court (per Frankfurter, J.) are so pertinent to the present controversy that they are repeated here as follows:

> "That the Commission itself was of divided mind in the successive stages of this controversy emphasizes that the problem is enmeshed in difficult judgments of economic and transportation policy. Neither rule of thumb nor formula nor general principles provide a ready answer. We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. It is not for us to tinker with so sensitive an organism as the grain rate structure only a minor phase of which is caught in the record before us. If we were to grant the relief sought by the appellants, we would be restoring evils which the exclusive rate-break adjustment was designed to remove—evils which, for all we know, would be far more serious than those complained of by the appellants." (314 U. S. 548.)

CONCLUSION.

It is submitted that the Regulations of the Commission on Chain Broadcasting are not arbitrary or capricious; that the findings of the Commission are amply supported by the evidence; and that the decision of the court below should be affirmed.

Respectfully submitted,

MUTUAL BROADCASTING SYSTEM, INC.

By

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Counsel for Appellee.

February 3, 1943.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 554.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

and

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor-Respondent.

No. 555.

COLUMBIA BROADCASTING SYSTEM, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, and MUTUAL BROADCASTING SYSTEM, INC.,

Respondents.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION OF ASSOCIATION OF NATIONAL ADVERTISERS, INC., FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*

ISAAC W. DIGGES,
Counsel for Association of National Advertisers, Inc., as Amicus Curiae.

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Respondents.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Motion for Leave to File Brief as *Amicus Curiae*

May it Please the Court:

The undersigned, as counsel for the Association of National Advertisers, Inc., respectfully moves this Honorable Court for leave to file the accompanying brief in these cases as *amicus curiae.* Written consent of all parties to the litigation has been obtained.

ISAAC W. DIGGES,
Counsel for Association of National Advertisers, Inc., as Amicus Curiae.

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Respondents.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF ASSOCIATION OF NATIONAL ADVERTISERS, INC., AS *AMICUS CURIAE*

Preliminary Statement

This brief is submitted on behalf of the Association of National Advertisers, Inc., a non-profit membership corporation of the State of New York, in opposition to regulation 3.104 of the order of the Federal Communications

Commission at issue before this Court in the above-captioned litigation, which regulation reads as follows:

> "No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a.m. to 1 p.m.; 1 p.m. to 6 p.m.; 6 p.m. to 11 p.m.; 11 p.m. to 8 a.m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

This brief is filed with the written consent of all parties to the litigation.

The Association of National Advertisers, Inc., comprises 316 members representing manufacturers and service organizations located throughout the United States, whose common interest is the use of national advertising as a vehicle for the orderly marketing of their goods, wares, merchandise and services. Its membership comprises large national advertisers as well as small and medium-sized national advertisers, some of whom are large users of radio broadcast advertising, some medium or small-sized users of radio advertising, many potential users of that medium of advertising, and some do not use or anticipate using radio at all.

The Association of National Advertisers, Inc. is the only organized voice of the national advertiser[1] and exists for the following purposes:

---

[1] According to compilations made by the Publishers Information Bureau and Broadcasting Magazine, members of the Association of National Advertisers placed with the networks 72% of gross business of the networks in 1940.

"The objects of the Association shall be the safeguarding of the essential values in advertising as an instrument for inducing sales; the elimination of waste and inefficiency in the process of distributing goods, wares and merchandise; the furtherance of the science of advertising and marketing; and the promotion of the common interests and welfare of its members, as buyers of advertising, and otherwise." [Constitution, Article III]

ARGUMENT

POINT I

Regulation 3.104 is invalid unless enacted by the Commission pursuant to the requirements of public convenience, interest or necessity.

It is necessary to the validity of regulation 3.104 that it have been enacted pursuant to the requirements of public convenience, interest or necessity. This is true whether it stems from an exercise by the Commission of its power to enact special regulations as to chain broadcasting [Section 303(i) of the Communications Act of 1934] or of its licensing powers [Communications Act of 1934, Sections 307 and 309].

The power of the Commission to act under either of these statutory provisions is limited expressly to the requirements of public convenience, interest, or necessity.

These are terms of definite meaning. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933); *Heitmeyer* v. *Federal Communications Commission*, 95 F. (2nd) 91, 100 (C. of A., D. C., 1937); *Texas, et al.* v. *United States, et al.*, 292 U. S. 522,

531 (1934); and *New York Central Securities Corporation* v. *United States, et. al.*, 287 U. S. 12, 24, 25 (1932). As such they define the limits of the Commission's authority. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co., supra; Heitmeyer* v. *Federal Communications Commission, supra; United States* v. *American Bond & Mortgage Co, et al.*, 31 F. (2nd) 448 (D. C. N. D. Ill., E. D., 1929).

> "In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority."
>
> *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, 138 (1940).
>
> "The Commission's responsibility at all times is to measure applications by the standard of 'public convenience, interest, or necessity.'"
>
> *Ibid*, at page 145.

Furthermore, even though regulation 3.104 may have been enacted pursuant to Section 303(i) of the Act, it does no more than establish in advance a rule for the manner in which the Commission shall at a later date exercise its licensing power. It carries no sanction or penalty other than adverse execution of the Commission's licensing functions. "The regulations are rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the grounds specified in the regulations without more." *Columbia Broadcasting System, Inc.* v. *United States et al.*, 316 U. S. 407, 418 (1942). "• • • they [the regulations] presently determine rights on the basis of which the Commission is required to withhold licenses

and authorized to cancel them; * * *" *Ibid*, at pages 421 and 422.

By their nature, then, these are rules for the exercise of the Commission's licensing powers, and, as such, they must be subject to the same delimitations of authority as are inherent in such powers. If the licensing power must be limited to and exercised for the public convenience, interest or necessity, self-adopted rules of the Commission as to its manner of employing its authority cannot serve to vitiate the jurisdictional restriction that Congress has seen fit to impose upon it. Delegated powers cannot be enlarged by the delegate through its enactment of rules which would permit a wider latitude than originally granted.

When the Commission grants, rejects, modifies or revokes a license, it must do so in obedience to the standards for such action which Congress has established. It cannot rewrite them or disregard them under the guise of adhering to its own regulations. In short, the Commission cannot pull itself up above its Congressionally defined powers by the bootstraps of its own "rule-making" power.

Any regulation enacted by the Commission beyond the framework of its delegation is a usurpation of powers not conferred upon it by Congressional grant, and consequently void. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co., supra; United States, et al.* v. *Baltimore & Ohio Railroad Co. et al.*, 293 U. S. 454 (1935); *Wichita Railroad & Light Company* v. *Public Utilities Commission of the State of Kansas, et al.*, 260 U. S. 48 (1922).

It is the proper subject of judicial review to determine whether the Commission in enacting regulation 3.104 acted within or without the scope of authority (sometimes referred to as "quasi-jurisdiction") delegated to it by Congress.

Thus, in *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., supra,* Mr. Chief Justice HUGHES, writing for the Court, stated at 289 U. S. 276 and 278:

> "Questions of law form the appropriate subject of judicial determinations. Dealing with activities admittedly within its regulatory power, the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. These standards the Congress prescribed. The powers of the Commission were defined, and definition is limitation. Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass."
>
> . . . . . .
>
> "When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power."

POINT II

Regulation 3.104 is invalid unless:

1. **There is a finding by the Commission that the public convenience, interest or necessity requires its enactment; and**
2. **Such finding is supported by substantial evidence.**

Where Congress delegates regulatory authority to an administrative agency and provides in the enabling statute for some condition prerequisite to the right of the delegate to exercise such power, no act of the agency in pursuance thereof is valid unless the condition prerequisite exists and is expressly found to exist by the agency as the basis for its action.

This principle has been restated frequently by this learned Court.

In *United States et al.* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475 (1942), Mr. Justice DOUGLAS, delivering the opinion of the majority, wrote at pages 488 and 489:

> "The precise grounds for the Commission's determination that only certain commodities could be carried and that only a few could be transported between designated points are not clear. It is impossible to say that the standards which we have set forth were applied to the facts in this record. Hence, as in *Florida* v. *United States*, 282 U. S. 194, 215, the defect is not merely one of the absence of a 'suitably complete statement' of the reasons for the decision; it is the 'lack of the basic or essential findings required to support the Commission's order'. And see *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 464; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510-511. Congress has made a

grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied; then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command'. *Opp. Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126, 144."

And in *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454 (1934), which involved the validity of a regulation by the Interstate Commerce Commission, under the Boiler Inspection Act, requiring certain equipment on locomotives, the Court stated the basis of its holding in the following language at pages 462 and 463:

"The railroads contend that to support the order certain basic findings are essential; that these were not made; and that, hence, the order is void. This contention is in our opinion sound. The Act does not confer upon the Commission legislative authority to require the adoption on locomotives of such devices as, in its discretion, it may from time to time deem

desirable. The operation of an engine, however equipped, involves some 'danger to life or limb.' At common law the carriers were 'free to determine how their boilers should be kept in proper condition for use without unnecessary danger.' *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, 529. And the Act conferred authority to prescribe by rule specific devices, or changes in the equipment, only where these are required to remove 'unnecessary peril to life or limb.' The power to make the determination whether the proposed device or change is so required, vests in the Commission. But its finding to that effect is essential to the existence of authority to promulgate the rule; and as Congress has made affirmative orders of the Commission subject to judicial review, *The Chicago Junction Case*, 264 U. S. 258, 263-265, the order may be set aside unless it appears that the basic finding was made. *Florida* v. *United States*, 282 U. S. 194."

A cogent restatement appears in the opinion written by Judge LEARNED HAND for a three-judge court in *Baltimore & O. R. Co., et al.* v. *United States*, 22 F. Supp. 533, 536, 537 (D. C., N. D. N. Y., 1937):

"The purpose of findings in such cases is to enable the Courts to discharge their proper function, which is to make sure that the Commission in the discharge of its highly specialized and technical duties, has followed the statute."

* * * * * * *

"The Supreme Court has been increasingly insistent upon the necessity of findings upon the pivotal facts. The defendant says that in Florida v. United States, 292 U. S. 1, 54 S. Ct. 603, 78 L. Ed. 1077, the Commission's very jurisdiction to regulate intrastate rates hinged upon a finding that they directly affected interstate rates; and that here no jurisdictional facts are at issue. 'Jurisdiction' is a treacherous word;

> we are not clear that the Commission's jurisdiction is not involved; but in any event in United States v. Baltimore & Ohio R. R., 293 U. S. 454, 464, 55 S. Ct. 268, 272, 79 L. Ed. 587, it was expanded to "'quasi-jurisdictional', which was meant to cover all 'indispensable' facts; and in United States v. Chicago, Milwaukee, St. Paul & P. R. R. Co., 294 U. S. 499, 504, 55 S. Ct. 462, 464, 79 L. Ed. 1023, the phrase, 'basic or quasi-jurisdictional facts' was substituted, as in Morgan v. United States, 298 U. S. 468, 480, 56 S. Ct. 906, 911, 80 L. Ed. 1288. What findings are 'basic' is a practical matter; those are such which we need to ascertain on what legal theory the Commission has proceeded; they are absent here, and we think that for this reason the two orders are invalid and should be set aside."

In *Missouri Broadcasting Corporation* v. *Federal Communications Commission*, 68 App. D. C. 154, 94 F. (2nd) 623 (1937); *Heitmeyer* v. *Federal Communications Commission*, *supra*; *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. (2nd) 554 (C. of A., D. C., 1938), *certiorari denied*, 305 U. S. 613; and *Tri-State Broadcasting Co., Inc.* v. *Federal Communications Commission*, 96 F. (2d) 564 (C. of A., D. C., 1938), orders of the Commission were reversed and remanded for lack of suitable findings by the Commission as to the basic facts necessary to sustain their validity. A full review of the principles requiring such findings as prerequisite to validity of administrative action will be found in the opinion of the *Saginaw* case at 95 F. (2nd) pages 560 and 561.

The necessity of adequate findings to support administrative action exists even where the agency acts in its quasi-legislative, as contradistinguished from its quasi-judicial, capacity, if the empowering statute establishes some prerequisite to the exercise thereof.

This appears clearly from the holding in *United States v. Baltimore & Ohio R. Co., supra,* where an order of the Interstate Commerce Commission requiring the equipment of locomotives of a certain class with power reverse gears after a certain future date was set aside for lack of a finding by the Commission that the absence of such gears on such locomotives would constitute an "unnecessary peril to life or limb."

Quite clearly the enactment of this rule by the Interstate Commerce Commission was an exercise of its quasi-legislative function, as it established a new rule of general application looking toward the future. A finding of the existence of the conditions prerequisite to the right of the Commission to exercise such quasi-legislative power was nevertheless held necessary, and its absence rendered the rule void.

Of course, where Congress has established no condition precedent to an administrative body's authority to exercise a legislative function, no such finding is necessary to the valid exercise thereof, as there is no "indispensable fact" which need be found. *American Telephone and Telegraph Co. et al.* v. *United States et al.*, 14 F. Supp. 121 (D. C. S. D. N. Y., 1936) *affirmed*, 299 U. S. 232 (1936).

If the Communications Commission enacted regulation 3.104 in the exercise of its licensing power under Sections 307 and 309, the requirement of a finding of the basic facts necessary to the validity thereof, including that of public convenience, interest or necessity, is clear. *Federal Radio Commission* v. *Nelson Brothers Bond and Mortgage Co.*, 289 U. S. 266, at pages 276, 277 and 278 (1933). *Heitmeyer v. Federal Communications Commission, supra; Missouri Broadcasting Corporation* v. *Federal Communications Commission, supra; Saginaw Broadcasting Co.* v. *Federal Communications Commission, supra;* and *Tri-State Broad-*

casting Co., Inc. v. *Federal Communications Commission, supra.* The provisions of Section 402(e) of the Communications Act of 1934 providing that on appeal from an order of the Commission made under its licensing powers "* * * findings of fact by the Commission, if supported by substantial evidence shall be conclusive * * *" clearly impose such a requirement.

If, on the other hand, regulation 3.104 was enacted by the Commission pursuant to Section 303(i) of the Act, the power to do so thereunder is also made expressly dependent upon a pre-existing requirement of public convenience, interest, or necessity.

If made under Section 303(i) of the Act, regulation 3.104 is subject to judicial review in the same manner as orders and regulations of the Interstate Commerce Commission under the Urgent Deficiencies Act. Section 402(a) of Communications Act; *Columbia Broadcasting System* v. *United States, et al., supra.* In addition, the same duty is expressly impressed upon the Communications Commission as upon the Interstate Commerce Commission, "to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises" [Communications Act of 1934, Section 404; Interstate Commerce Act, Section 14(1)]. The wording of the provisions in the two Acts is identical each with the other in this respect. It was therefore clearly the Congressional intent that the report and findings of the Communications Commission, and the scope of judicial review of its orders, be the same and subject to the same principles as have attached to those of the Interstate Commerce Commission under the corresponding statutory provisions.

The following language and holding of this Court in *United States* v. *Baltimore & Ohio Railroad Co.*, 293 U. S.

454, 465 (1934), is, therefore directly applicable: "It is true that formal and precise findings are not required under § 14(1) of the Interstate Commerce Act, which declares that the report 'shall state the conclusions of the Commission together with its decision.' Compare *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 487; *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 428. That provision relieves the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½. *But § 14(1) does not remove the necessity of making, where orders are subject to judicial review, quasi-jurisdictional findings essential to their constitutional or statutory validity.*" (Italics added.)

Equally applicable is the following excerpt from the opinion in *Dubois, et al.* v. *Central R. Co. of New Jersey, et al.*, 22 F. Supp. 469, 472 (D. C., D. N. J., 1938):

> "In Beaumont, S. L. & W. Ry. Co. v. U. S., 282 U. S. 74, 86, 51 S. Ct. 1, 6, 75 L. Ed. 221, the court made the following comment: 'Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this. Wichita R. R. v. Public Utilities Commission, 260 U. S. 48, 58, 43 S. Ct. 51, 67, L. Ed 124. And we have recently emphasized the duty of such courts fully to state the grounds upon which they act. Virginian Ry. v. United States, 272 U. S. 658, 675, 47 S. Ct. 222, 71 L. Ed. 463; Lawrence v. St. Louis-San Francisco Ry., 274 U. S. 588, 591, 592, 47 S. Ct. 720, 71 L. Ed. 1219; Arkansas Commission v. Chicago, R. I. & P. R. Co., 274 U. S. 597, 603, 47 S. Ct. 724, 71 L. Ed. 1224; Hammond v. Schappi Bus Line, 275 U S. 164, 171, 48 S. Ct. 66, 72 L. Ed. 218; Cleveland, C., C. & St. L. Ry. v. United States, 275 U. S. 404, 414, 48 S Ct. 189, 72 L. Ed. 338; Baltimore & Ohio R. Co.

v. United States, 279 U. S. 781, 787, 49 S. Ct. 492, 73 L. Ed. 954.'

"The Commission's failure to make adequate findings of fact was again held to render its order void in U. S. v. Chicago, M., St. P. & R. Co., 294 U. S. 499, 55 S. Ct. 462, 79 L. Ed. 1023. In this case the Commission wrote a long and discursive report, concluding with a statement that the proposed rates which the Commission disapproved would be unreasonable and in violation of section 1(5), which denounces unreasonable charges. Nevertheless, the court in an opinion by Mr. Justice CARDOZO held the order void for lack of adequate findings, because 'This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power Florida v. United States, 282 U. S. 194, 215, 51 S. Ct. 119, 75 L. Ed. 291; United States v. Baltimore & Ohio R. Co. (January 7, 1935), 293 U. S. 454, 55 S. Ct. 268, 79 L. Ed. 587.' 294 U. S. 499, 504, 55 S. Ct. 462, 465, 79 L. Ed. 1023.

" 'The statement in the second of these paragraphs that the proposed rates would be "unreasonable" must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated,' 294 U. S. 499, 506, 55 S. Ct. 462, 465, 79 L. Ed. 1023.

"The case of Florida v. United States, 282 U. S. 194, 51 S. Ct. 119, 75 L. Ed. 291, sheds furthers light upon the requirement that the Commission make appropriate findings. The court made the following observation: 'The question is not merely one of the absence of elaboration of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (The Beaumount, Sour Lake & Western Railway Company v. United States, 282 U. S., p. 74, 51 S. Ct.

1, 75 L. Ed. 221), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. *The Commission is the fact finding body, and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported.'* 282 U. S. 194, 215, 51 S. Ct. 119, 125, 75 L. Ed. 291. (Italics supplied.)

"Accordingly, it appears that the first inquiry to be determined is whether or not the report of the Commission is supported by findings of fact."

POINT III

There is no finding by the Comission that the public convenience, interest, or necessity required enactment of regulation 3.104.

In the case at bar the Commission's regulation 3.104 is not supported by any findings. The Commission has made no findings of fact at all, and its order enacting the regulation sets forth none.

The only pronouncement by a majority of the Commission which comes anywhere near being an administrative finding is Chapter IX of its "Report on Chain Broadcasting" which appears under the caption "Conclusion."

It is respectfully submitted that this pronouncement does not constitute the findings of fact requisite to a valid exercise by the Commission of its regulatory powers that due process demands.

The chapter of the report captioned "Conclusion" consists of nothing more than argumentative assertions and the statement of bare opinions entertained by a majority of the Commission. Nothing more is needed to establish their complete lack of the characteristics of definite and precise factual findings prerequisite to valid administrative regulation than the language in which they are couched and with which most of them are introduced. Many of them, for example, are qualified by the words "we believe". Elsewhere we find such statements as: "we subscribe to the view that * * *"; "we doubt that * * *"; "we are under no illusion that * * *"; and, "* * * the steps now taken may perhaps operate as * * *".

Statements such as these are far too speculative, vague, indeterminate and conclusory to satisfy the requirements of proper findings.

> "It is to be noted, at this point, that the Commission has narrowed the case down to one question, *i. e.*, Was the applicant financially qualified? Our inquiries, therefore, are similarly narrowed to a consideration of the three italicized paragraphs of the 'Statement.' Upon them the Commission's decision must stand or fall. Do they contain findings of fact, and, if so, are such findings supported by substantial evidence? Generally speaking, the three paragraphs consist of a more or less indiscriminate commingling of arguments, speculations, statements of fact, narrative recitals of testimony, and conclusions of law. Taken as a whole, they cannot be said to constitute findings of fact such as are contemplated by the statute. Necessarily, therefore, they provide a highly unsatisfactory basis for appeal, and thus defeat the purpose of the statute; which is to inform the parties and this court of the reasons for the Commission's action, with that high degree of certainty

which may properly be expected from a group of administrative experts such as constitute the Communications Commission. Boss, et al. v. Hardee, 68 App. D. C. 75, 93 F. 2d 234, decided September 20, 1937."

Heitmeyer v. *Federal Communications Commission*, 95 F. (2nd) 91, 96 (C. of A., D. C., 1937).

Most significant of all, perhaps, as indicating that the regulations at issue are born of the Commission's desire to experiment rather than the product of a definite finding of fact that they are in the public interest is the sentence reading, "If the industry cannot go forward on a competitive basis, if the substantial restraints upon competition which we seek to eliminate are indispensable to the industry, then we must frankly concede that broadcasting is not properly a competitive industry."

The conclusion is inescapable that the Commission has deliberately refrained from making a finding that these regulations are required by public interest, convenience or necessity, since, at this stage and until the Commission has carried out its experiment, it has no basis for finding (as contradistinguished from believing or theorizing) that such is the true fact.

"Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency." Mr. Justice CARDOZO in *United States, et al.* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co., et al.*, 294 U. S. 499, 511 (1935).

POINT IV

There is no substantial evidence to support a finding by the Commission that regulation 3.104 is in the public convenience, interest, or necessity.

Assuming, *arguendo*, without conceding, that Chapter IX of the Commission's "Report on Chain Broadcasting", which bears the heading "Conclusion", is a statement of the findings of a majority of the Commission, we respectfully submit that there is no substantial evidence to support that portion thereof which is necessary to the validity of regulation 3.104.

(If no finding by the Commission were necessary as to the quasi-jurisdictional fact that regulation 3.104 is required by the public convenience, interest or necessity, the following portions of this brief would nevertheless be applicable in support of our contention that as a matter of fact the said regulation is not required by the public convenience, interest or necessity and that, consequently, as a matter of law it is enacted without the framework of the powers delegated to the Commission by Congress. These are separate legal propositions, although the arguments in support of each may coincide.)

The first stated conclusion of the Commission, and we assume from its preeminent position that it is deemed by the Commission to be of prime importance, is "that the network method of program distribution is in the public interest. We subscribe to the view that network broadcasting is an integral and necessary part of radio."

With this as the premise, it obviously and inescapably follows that anything operating to destroy the network system of broadcasting runs counter to the public interest.

Section 3.104, therefore, is, by the Commission's own conclusion, in derogation of the public interest unless it does not impair the network system of broadcasting. There is no evidence to support a finding that the said regulation will not have such an adverse result. "A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action. *Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547, 548; *New England Divisions Case*, 261 U. S. 184, 203, 204; *Keller* v. *Potomac Electric Power Co., supra*; *Chicago Junction Case*, 264 U. S. 258, 263, 265; *Silberschein* v. *United States*, 266 U. S. 221, 225; *Ma-King Products Co.* v. *Blair*, 271 U. S. 479, 483; *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 30; *Tagg Bros.* v. *United States*, 280 U. S. 420, 442; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 654; *Crowell* v. *Benson*, 285 U. S. 22, 49, 50."

Federal Radio Commission v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 277 (1933).

The only pertinent conclusion expressed by the Commission appears in the following language:

> "The prophecy that regulations such as we are adopting will 'result in the eventual destruction of national program service' and 'destroy the American system of network broadcasting' is, we believe, the

exaggeration of advocacy. The practices which we find contrary to public interest were instituted to restrict competition within the broadcasting field, not to protect commercial broadcasting from competition by other types of advertising. Everyone familiar with broadcasting as an advertising medium knows that radio reaches a different audience from other types of advertising, and that it reaches them in a different way. We doubt that the networks have so little faith in the stability of their own enterprise as is suggested by their insistence that the whole structure of commercial broadcasting will collapse if their relations with outlets are modified along the lines indicated. It is incredible that the industry's footing is so insecure. The prediction that advertisers will desert radio in favor of newspapers, magazines, or billboards is singularly unconvincing." (Commission's Report, p. 88.)

The record is barren not only of substantial evidence, but even of a scintilla of evidence, to support any finding that wholesale destruction of radio stations' freedom to contract for time options will not deal a damaging blow to network broadcasting. All that we have in this record is the bare "belief" expressed by the Commission as a "conclusion", and its "doubt * * * that the whole structure of commercial broadcasting will collapse if their relations with outlets are modified along the lines indicated." No factual evidence of any kind whatever supports it.

To the contrary, common knowledge and experience well accepted in the field of advertising, merchandising and distribution, and the generally known past experiences of the broadcasting industry itself, establish that *the network system of broadcasting is dependent upon the ability of the networks to obtain options for radio time from their affiliates.* Despite the fact that these economic considerations,

inherent in the placement of advertising contracts, easily could have been ascertained upon inquiry by the Commission, the Commission nevertheless issued no invitation to the advertising community, as represented by buyers of radio advertising, to present evidence to the Commission.[1]

A

The "Option" in Regulation 3.104 is Not an Option

Regulation 3.104 upon its face contains misleading language. It pretends to permit "options" when options in fact are prohibited, except in favor of networks as against local merchants. The "options" which purportedly the local broadcast stations may give to networks, turn out to be nothing but verbiage, for the grant of the right of option is immediately destroyed by the provision that such "options" may not be exclusive as against other network organizations and may not prevent or hinder the stations from "optioning" or selling any or all of their time, to other networks. Thus, the only "option" is the "option" of the "optionor", so far as the networks are concerned. This point is emphasized for the reason that for all practical purposes the present regulation 3.104, amended by the Commission after supplemental hearings, is the same in its application to networks as the original regulation 3.104, which prohibited options entirely. Comprehension of that fact is essential to an understanding of the practical impact of that section upon the business of national advertising.

[1] Commission's Report, page one.

B

Regulation 3.104 Promotes Monopoly by Permitting Concentration of Buying Power

The regulations at issue, in so far as they relate to methods of placing business with radio broadcast stations, concern themselves exclusively with "options" (Sections 3.102 and 3.104). There is no rule delimiting the right to enter into contracts for radio time, either by a network, a national advertiser, an advertising agent, or by any one else. From this omission springs the vice in regulation 3.104.

The Commission has found that of the 660 licensed stations in the United States, 30 only of such stations have clear channels of 50,000 kilowatts operated on an unlimited schedule (Commission's Report, p. 31). Those thirty stations are the most powerful in the United States (Commission's Report, p. 32).

Charts prepared by an advertising expert and offered before the Senate Committee on Interstate Commerce[1] on June 18, 1941, show that 100% of the population of the United States could be reached through the use of only 64 radio stations at a time cost of $12,015.00, whereas a second advertiser wanting to use the same time on the air would have to use 160 different stations at a cost of $14,788.00, but would only be able to reach 84.1% of the population of the United States; a third advertiser wishing to use the same time would have to use 191 stations and be content with a maximum of 67.2% of the population of the United States at a cost of $12,965.18. Thus it would appear that

[1] Hearings before the Committee on Interstate Commerce, United States Senate, Seventy-Seventh Congress, First Session, on S. Res. 113, June 2 to 20, 1941, pages 458, 475, 511, 512.

inevitably competition among purchasers would be keenest for the use of the thirty most powerful stations, or for the 64 radio stations comprising the best coverage of the United States, for the simple reason that of the possible combinations for nationwide coverage above set forth, the cheapest and most conveniently obtainable would be comprised of the best stations.

It is common knowledge in the advertising business, and is well known to the Association of National Advertisers, that plans presently are under consideration to enter into just such time contracts if regulation 3.104 is held to be valid.

The reason for such a trend is quite apparent. Many large national advertisers have a great investment in good-will represented by consumer acceptance of given programs at given hours. It is only natural that they should wish to preserve the good-will inherent in these listening habits at a minimum of cost. Thus, when contracts for the best stations have been entered into, a lesser opportunity will be offered to the remaining radio stations throughout the country, as well as a lesser opportunity to the remaining national advertisers. Under existing conditions, no national advertiser is so enabled to monopolize the market, for according to the charts cited, *supra*, he would be obliged to purchase time on stations affiliated with at least three different networks in order to get time on all of those stations.

If it be true, as found by the Commission that:

> "Since a national network must have outlets in the more important markets of the country, it is readily apparent that exclusive network affiliation contracts severely limit the number of national networks which may do business" (Commission's Report, p. 51),

it is doubly true that the ability of national advertisers—or more exactly, the ability of a few large and powerful national advertisers—to contract for the key stations of the country would substitute for the four highly competitive existing nationwide network organizations a monopolistic network of the larger stations.

An even greater hazard is presented in the power to monopolize inherent in the ability of a few large advertising agencies (whose operations will be discussed *infra*) to tie up the most desirable radio facilities in the United States. 75% of the gross dollar volume of the advertising business of the networks was received in 1940 through ten leading advertising agencies, acting in behalf of their clients.[2] The number of advertising agencies placing a volume of business in all advertising mediums in excess of ten million dollars a year is approximately eight.[3]

C

The Commission's Conclusions Are at War With Commonly-Known Facts

A majority of the Commission has concluded that:

> "Everyone familiar with broadcasting as an advertising medium knows that radio reaches a different audience from other types of advertising, and that it reaches them in a different way. We doubt that the networks have so little faith in the stability of their own enterprise as is suggested by their insistence that the whole structure of commercial broadcasting will collapse if their relations with

[2] Advertising Age, issue of January 13, 1941; Variety, issue of January 15, 1941.

[3] "Advertising Agency Compensation." Professor James W. Young, (University of Chicago Press, 1933) at page 15.

outlets are modified along the lines indicated. It is incredible that the industry's footing is so insecure. The prediction that advertisers will desert radio in favor of newspapers, magazines, or billboards is singularly unconvincing." (Commission's Report, p. 88.)

This wholly erroneous conclusion of the Commission majority has doubtless led it to the error into which it fell in promulgating regulation 3.104.[1]

It is not engaging in hyperbole to state that there is no one familiar with the processes of national advertising who does not know that the audience to which radio advertising is directed is precisely the same audience to which competitive advertising mediums address their messages. The form of message may differ for one advertising medium or another, but, obviously, the audience to be reached in any given case is always the same, regardless of which medium of advertising is used; that audience in any case is the composite of the consumers which the advertiser wishes to influence towards the purchase of his product or the use of his service. Radio is not a thing apart; its use by the national advertiser is most often a coordination with the use of other advertising mediums, such as newspapers, magazines, and outdoor advertising. The same audience as that now reached by radio was reached by the national advertiser before the advent of radio. A great many advertisers do not use radio at all, but address themselves to the same audience as radio advertisers. A casual glance at a morning newspaper in any fair-sized community will disclose that there are many national advertisers who appeal to the

[1] While the Commission might be presumed to have special competence and knowledge in the field of radio communications, it has no special competence or knowledge in the field of national advertising and should have sought the facts from national advertisers.

public both through the press and through radio. The published statements of those newspapers is ample evidence that they reach audiences as wide as many radio programs in the community, and sometimes reach greater audiences. The same thing is true of outdoor advertising. With a deteriorated efficiency in radio broadcasting, it is axiomatic that newspapers, and other competitive mediums of advertising, would gain at the expense of radio.

The national advertisers can reach their audience if radio is eliminated entirely.

National advertisers, particularly those who make an appeal to the consumer in his home, in formulating their advertising plans, are interested in one thing only, the efficiency of their advertising messages in producing sales at a low cost, with a minimum of waste. They have no concern with the fortunes of a particular medium of advertising, or of the fortunes of the various instrumentalities that comprise that medium, whether it be radio or anything else, except as the facilities obtainable may be used as a tool for the scientific marketing of their wares. The advertiser wants to reach his exact market, to the extent possible.

In that regard, a Harvard report,[2] says:

> "In order to assure profitable operation, management has found it increasingly necessary to know which item or groups of items and which customers or types of customers are profitable, and how effort should be related to the needs of the different items and markets. Good management has found it unwise merely to appropriate funds for advertising

[2] Borden, "The Economic Effects of Advertising" (Irwin, 1942), being a research project of Harvard School of Business Administration, hereinafter referred to as the Harvard Report.

> and selling to be spent over broad territories with a check only on final profit results, for the final profit result, even though favorable, may represent a combination of losses in some markets and profits in others. Moreover, good management recognizes that selling effort should be fitted to the needs of particular markets of a size whose operations can be readily appraised and directed" (p. 131).

This view on the part of national advertisers does not stem from whim or caprice. Each national advertiser is operating in a highly competitive market, and he must so plan his advertising expenditure that a fair return is secured to him from that expenditure; otherwise, he must fall by the wayside. The use of advertising is therefore interwoven into the economic fabric of the nation as a whole.[3] The Commission erred in not seeking to explore these interrelated factors, which are at the heart of the question. It is respectfully urged that, had such an exploration been made, regulation 3.104 would have been quite differently conceived.

D

Regulation 3.104 Will Create Barriers Against the Use of Radio by National Advertisers

Advertising appropriations do not spring full-panoplied from the head of Jove. They result from long and careful preparation, first of the market, and later of the specific advertising theme and its application.

> "After World War I", says the Harvard Report, *supra*; "the larger advertising agencies generally, though not universally, established research departments to make market studies for their clients [na-

[3] "Whatever combination of forces may have been responsible for the remarkable growth of advertising in the past 75 years, there can be no question of its i- -tance in the present economy." Harvard Report, *supra*, at p.

tional advertisers]. Small agencies as a rule did not offer organized research service, however, nor did small clients employ field investigation organizations on any considerable scale. But even for small advertisers employing agencies, the hit-or-miss use of advertising of early days disappeared. *In recent years some attempt to delimit markets, to lay out schedules and copy approach, and to select proper media to reach markets has become an established part of advertising agency work even for the small advertiser, while the studies made for large advertisers are often elaborate.*" (Italics added.) (p.127)

After the market investigation has taken place, the facts thereby developed are fitted into a pattern by trained specialists known as advertising agencies. This pattern may involve the use of one medium of advertising or several, but most commonly it involves a combination of various means of reaching and influencing the public, often to the moment of actual purchase, through such an instrumentality as a window poster or a display on the counter of the merchant.[1] When several mediums of advertising are being

[1] "The work of an advertising agency as described in the Agency Service Standards of the American Association of Advertising Agencies is as follows:

"'Agency Service consists of interpreting to the public, or to that part of it which it is desired to reach, the advantages of a product or service.

"'Interpreting to the public the advantages of a product or service is based upon:

"'1. A study of the product or service in order to determine the advantages and disadvantages inherent in the product itself, and in its relation to competition.

"'2. An analysis of the present and potential market for which the product or service is adapted:
As to location
As to extent of possible sale
As to season
As to trade and economic conditions
As to nature and amount of competition

used concurrently, it logically ensues that the advertising agency coordinates in a common and cohesive pattern the entire advertising "campaign" of the national advertiser, so that the "campaign" in all of its various aspects will "break" in the several markets, or throughout the nation, at the same time, and in the manner planned.

If a high degree of uncertainty should prevail as to the availability of time in such an important medium of advertising as radio broadcasting, or any important part thereof,

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"'3. A knowledge of the factors of distribution and sales and their methods of operation.

"'4. A knowledge of all the available media and means which can profitably be used to carry the interpretation of the product or service to consumer, wholesaler, dealer, contractor, or other factor.

"'This knowledge covers:

Character	
Influence	Quantity
Circulation	Quality
Physical Requirements	Location

"'Acting on the study, analysis and knowledge as explained in the preceding paragraphs, recommendations are made and the following procedure ensues:

"'5. Formulation of a definite plan.

"'6. Execution of this plan:

a) Writing, designing, illustrating of advertisements, or other apropriate forms of the message.

b) Contracting for the space or other means of advertising.

c) The proper incorporation of the message in mechanical form and forwarding it with proper instructions for the fulfillment of the contract.

d) Checking and verifying of insertions, display or other means used.

e) The auditing, billing and paying for the service, space and preparation.

"'7. Cooperation with the sales work, to insure the greatest effect from advertising.'"

Advertising Agency Compensation, by Professor James W. Young (University of Chicago Press, 1933), at pages 3 and 4.

it would become impossible for the advertising specialists to plan with any real foresight how to coordinate the medium of radio with the other mediums desired to serve the needs of the national advertiser. In current practice, it is possible for the advertising agent to keep currently abreast of time available in radio because representatives of the networks, who are constantly soliciting his custom, make it their business to keep him advised day in and day out as to open schedules, which they are enabled to do because of existing options. He can thus plan ahead with assurance, just as he can with other mediums of advertising. (Newspapers and magazines can always expand physically by adding another page. Outdoor advertising has one central source of information to which inquiries may be directed.)[2]

In view of these established, and necessary business practices, it is, therefore, not surprising that a network witness should have testified before the Commission that at a time when his network had been unable to make definite offers of time against a competitor who was able to do so, his network "lost considerable business." (Commission's Report, p. 65.)

It is not clear whether the networks originated the idea of optioning the time of independent standard broadcast stations in order to sustain simultaneous nationwide circulation, or whether the idea came from the advertisers and advertising agencies; it may have been a combination of the two; but regardless of who initiated the option time, *the conclusion is inevitable that the optioning of time of independent standard broadcast stations has brought the*

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[2] Prof. Young, in his book "Advertising Agency Compensation," *supra*, at page 37, says that "this organization of the National Outdoor Advertising Bureau, agency owned, gave all agents who wished to take advantage of it full opportunity to use the outdoor medium. This agency Bureau now places for its agency members over 75 per cent of the total national outdoor business."

medium of radio advertising into harmony with the actual needs of the national advertiser and with his marketing problems. Any claim of restraint of trade which may result from option time must thus be viewed, not as a reaching out of one or more of the networks to foreclose the markets to others, but as an accommodation of business practices in the industry to the reasonable requirements of the buyer.[3]

From the foregoing, it is respectfully submitted that the resultant introduction of uncertainty by regulation 3.104 into the placement of radio advertising would make the use of the advertising dollar less efficient, add to the cost of distribution, and lessen the revenue to radio from advertisers whose combined dollars now support the structure. This view finds historical justification. It is generally known to advertisers that a few years ago the medium of outdoor advertising found itself out of step with present day marketing practices, and faced receivership, until its practices were radically altered to conform with the needs of national advertisers.[4]

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[3] Charles F. Gannon, Radio Director of Erwin, Wasey & Co., wrote in 1932, prior to option time contracts of NBC and Mutual that "Long ago we were introduced to the fact that because stations are listed on a particular network's rate card, it does not follow that the network can always deliver such stations. The individual station, being torn between the desire to sell local time for real profit and to accept chain programs chiefly for prestige, frequently embarrasses one or another advertiser by refusing to move a local program to accomodate the network or vice versa. I rather believe that all commercial stations would be wise and helpful in appointing definite hours when network programs have precedence and other hours reserved exclusively for local and spot programs." (The Advertising Agency Looks at Radio, Appleton, 1932, at p. 60.)

[4] "When changes in the structure of the industry again made it possible for agencies to handle the medium on satisfactory terms, N. W. Ayer & Son promptly acquired membership in the Outdoor Advertising Association of America, Inc." The History of an Advertising Agent, by Hower (Harvard University Press, 1939) at page 198.

E

Regulation 3.104 Will Lessen Competition in the Purchase of Advertising

The fundamental interest of national advertisers is that, in the interest of efficient marketing, there should be free and open competition between the several mediums of advertising for the advertising dollar, just as free and open competition should subsist among producers in their solicitation of the consumer's patronage. This is the settled policy of the Association of National Advertisers, Inc.[1] and is conceived to be in the public interest.

Impediments placed in the path of the access of the national advertiser to the medium of radio obviously contravene the advertiser's best interests, and are therefore opposed.

In contravening the best interests of the national advertiser, however, Section 3.104 of the Commission's regula-

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[1] "With the purpose to make every dollar spent in advertising bring back greater returns as a beginning, the Association of National Advertisers has from year to year enlarged its facilities for service to its members until its operations cover every detail of advertising and marketing with information and counsel. Membership of the Association of National Advertisers is made up of companies. An individual is registered as representative. Eighteen per cent. of the registered representatives are presidents, general managers, vice-presidents or other general executives of their companies; 7 per cent are sales managers; 70 per cent. are advertising managers, publicity directors or directors of sales promotion; 5 per cent. are assistants to various executives. Each year there are two general meetings—one in the East and one in the West—at which there is 'hard-pan discussion of problems in specific terms' and a general exchange of experience. From the files of the Association, from special investigations, and from the general meetings, the more than three hundred members are constantly obtaining information that results in making advertising and allied activities more productive" (The History and Development of Advertising, by Frank Presbrey, and published by Doubleday, Doran & Comany, Inc. 1929), at page 545.

tions, renders a marked disservice to the public interest generally, for the whole structure of radio, with its emergent value to the people and to the Government of the United States[2] is supported by the advertising dollar.

The advertising dollar in radio thus takes on a broader aspect than its purely commercial uses. In this connection, it is interesting to note that in the United States where advertising is the most highly developed, the distribution of radio receiving sets is by far the greatest of any country in the world,[3] from which it may fairly be presumed that advertisers, and the network programs made possible by the advertisers' expenditures, effectively meet the wishes of the great body of the American public. The destruction of network organizations—the inevitable result of the application of regulation 3.104—will, at the same time, destroy the incentive of the national advertiser, and result quantitatively in a marked deterioration of the listening audience.

In a letter cited in a Federal Radio Commission report published in 1932,[4] it was stated: "This [advertising] agency enjoys one of the largest volumes of broadcasting business. In the event of legislative restriction, this business would immediately transfer to other advertising media or would dissolve entirely with extensive loss to themselves, radio networks, and individual stations of the radio busi-

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[2] "Radio constitutes an important factor in defense. Beside serving as a source of news and of entertainment vital to morale, it furnishes the principal channel through which civilian defense authorities disseminate directions and intelligence necessary to the public safety." Collation No. 1, Office of Price Administration, Part 1336.

[3] World Almanac, 1940; Broadcasting Yearbook, 1940.

[4] Commercial Radio Advertising, Senate Document No. 137 (1932).

ness. * * * The first objective of the sane sponsor is to attract the largest possible number of listeners and leave them more pleased than he found them. * * * The millions upon millions of letters emanating from the radio audience would indicate a satisfied state of mind. We are perfectly aware that there are a number of listeners who have registered objections. We believe these people belong to a class known as 'ready letter writers' * * * I believe the best programs that money and genius can develop constitute the structure of sponsored broadcasting which is *per se* the best broadcasting today." The question at that time before the Commission was the extent of advertising to be permitted by radio.

The same report of the Commission shows that the networks provided a wide variety of sustaining and sponsored programs, including symphonic music, literature, lectures in economics, Government, history and biography, discourses on world affairs, geography, travel, social welfare, and current news, womens' hours, childrens' hours, market and weather reports, etc.

It is certainly no exaggeration to say that in the welding of national morale at the time of the sneak attack on Pearl Harbor, no physical instrumentality was as valuable as radio in bringing to the whole people the imminent peril to the Nation.

It is true that the Commission pays lip service to the network concept. However, having enunciated that underlying principle, it proceeds, by regulation 3.104, to destroy the very principle which it enunciates. It is amazing that it should have reached such argumentative and summary conclusions as those set out *supra*, without inquiring into the

processes of national advertising and their relation to the networks.[5]

All of the primary private parties to this litigation recognize the necessity of "time" options. The record shows that even the broadcasting system which has intervened in this case on the side of the Commission filed a petition with the Commission to seek amendment to the original regulation 3.104, which prohibited time options entirely. It is respectfully submitted that regulation 3.104, as amended, though somewhat more wordy in language, is, from the viewpoint of network operation, the same as the original regulation 3.104.

Commenting on the Commission's Committee report on "Monopoly" in the Public Opinion Quarterly, issue of September, 1940, published by the School of Public Affairs of Princeton University, Professor C. J. Friedrich of Harvard College,[6] says that "the report is one-sided in that it features those aspects of broadcasting which contain

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[5] "The value of networks organization is inestimable from the point of view of programs * * * Individual stations could not afford to duplicate the quality and variety of network programs * * * There can be little doubt that network organization is essential to a good system of broadcasting * * *

"The development of networks was logical once public interest in radio passed beyond the stage of curiosity in a novelty * * * Moreover the efficiency of network broadcasting appealed to the advertisers. With the increased cost of broadcasting, the stations themselves felt the need for some cooperative action such as could be provided by network connections. In consequence of this combination of forces the national networks assumed a dominant position in the broadcasting structure." Rose, "National Policy for Radio Broadcasting (Harper, 1940) at pages 62, 63, 64 and 65. (This writing is a committee report of the National Economic and Social Planning Association.)

[6] Director of the Radio Broadcasting Research Project at the Littauer Center of Harvard University under a grant from the Rockefeller Foundation.

monopolistic practices of the chains, while neglecting those aspects which reveal the chains as strengthening competitive elements * * * The development of the chains has produced, over wide areas of the United States fierce *competition* for listener attention between the chains * * *

"In this connection it deserves mention that the report suffers from an inner contradiction in that it seeks to maintain that the networks have, as a result of their monopolistic power, come to control the programs of their outlets, and at the same time have surrendered their control over programs to advertisers"[7] * * * "Unless all signs deceive, the result of breaking up the networks would be the retailing of national programs to local stations by advertisers on terms even less favorable than those now provided by the networks, because such a procedure would be very costly for the advertising agencies. The tendency of listeners might well be to tune in to a few powerful stations of national scope, with consequent concentration of revenue in the hands of these few stations. There is a tendency in this direction anyway. One wonders to what extent the networks have been retarding it and thus have been helping to keep a considerable number of local stations going.

"This problem of number of stations is becoming pressing in the face of radio broadcasting in wartime."

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[7] That advertisers generally have given the public what it wants to hear is shown in Ten Years of Network Program Analysis, published by the Cooperative Analysis of Broadcasting (1939), which sets forth, *inter alia*, that Fred Allen had an initial audience-listening rating of 6.3%, but reached 20% after fourteen months of broadcasting; Lux Radio Theatre, had an early rating of 8.4%, which after fifteen months went above 20%; Charlie McCarthy climbed from a rating of 13.7% to a rating of 42.3%; Jack Benny rose from a 17.6% rating to a 35.7% rating (pp. 104 and 105).

F

The Commission Assumes Expert Qualifications in a Field Foreign to its Expert Knowledge

It might strongly be urged that the Commission's judgment should not be set aside when it has acted properly in a field in which it was legislatively created to function and in which it is, therefore, presumed to possess expert qualifications.

The essential facts relied upon in this brief, however, are drawn from and supported by generally accepted writings and source materials in the field of advertising, marketing and distribution. They are the product of common knowledge and experience in those fields and the proper subject of judicial notice.

Pertaining, as the facts do, to the advertising, marketing and distribution of commodities and services, they relate to a field separate and apart from that in which the Commission may be presumed to possess expert competence. As to those matters the Commission has but lay knowledge. There is no reason to presume, and no statutory basis for holding, that the Commission has been constituted an authority in these fields, or that this Court is foreclosed from taking into consideration upon this appeal the product of accepted knowledge and experience therein.

CONCLUSION

It is respectfully submitted that the order of the Federal Communications Commission should be set aside.

Respectfully submitted,

ISAAC W. DIGGES,
Counsel for Association of National Advertisers, Inc., as Amicus Curiae.

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Supreme Court of the United States

OCTOBER TERM, 1942

No. 554

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

No. 555

COLUMBIA BROADCASTING SYSTEM, INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,

Respondents.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*

GEORGE LINK, JR.,
Counsel for American Association
of Advertising Agencies
as *Amicus Curiae*.

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MOTION OF THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

May it Please the Court:

The undersigned, as counsel for the American Association of Advertising Agencies, respectfully moves this Honorable Court for leave to file the accompanying brief in these cases as *amicus curiae*.

GEORGE LINK, JR.,
Counsel for American Association
of Advertising Agencies
as *Amicus Curiae*.

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BRIEF OF AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, AS *AMICUS CURIAE*

Preliminary Statement

This brief is submitted on behalf of the American Association of Advertising Agencies, as *amicus curiae*.

This brief is filed with the written consent of the attorneys for all of the parties in this action.

The American Association of Advertising Agencies is an unincorporated non-profit association of advertising agencies, and their national organization. The word "agencies" does not accurately describe the activities of the members of the industry. Advertising agencies are more accurately described as advertising practitioners. They are retained by advertisers by reason of their accumulated knowledge of the artistry and technique of modern scientific advertising. In and of themselves they are large and substantial creative organizations with payrolls larger, in many instances, than those of their clients. The advertising practitioner has learned how the average person will react to various advertising appeals and techniques. This technique and artistry have been acquired by wide practical experience, through trial and error, scientific research, etc., at high cost. Advertisers now require the services of these advertising practitioners to counsel them in their advertising and marketing problems. The advertising practitioner originates and creates advertising plans for the advertiser. The advertising practitioner prepares the message. The advertising practitioner selects the media best adapted to the appeal to be made on a mass scale to the public. The advertising practitioner purchases the advertising space required from newspapers, magazines, and billboards and purchases the necessary time on radio stations and networks. Advertising practitioners prepare or aid in the preparation of broadcasting programs, including the preparation of the script, the hiring of the talent, the casting of the talent, the training of the talent and the rehearsal of the talent. In its purchase of time the advertising practitioner is financially responsible for the radio time used by its clients.

The principal object of the American Association of Advertising Agencies is to improve the practice of advertising by raising its ethical standards, by developing, through research, better technical and scientific methods of advertising, by the accurate appraisal of media circulation, readership and listening habits of the public and, broadly, by finding ways of better serving the enlightened self-interest of the consumer.

As between the advertising media, to wit: newspapers, magazines, billboards and radio, the American Association of Advertising Agencies is impartial. Its policy is to promote free and open competition between all such media, both vertically and horizontally.

ARGUMENT

POINT I

The Supreme Court should take judicial notice of the social and economic effect of the Federal Communications Commission's order of October 11, 1941, particularly Section 3.104.

The revenue which the networks and stations receive from commercial broadcasting has made the American system of broadcasting possible. This is stated again and again throughout the Federal Communications Commission's report. Currently, the clients of the advertising practitioners spend in excess of one hundred million dollars per year in commercial broadcasting. Currently, a part of the broadcast time is given by the clients of the advertising practitioners to the Government for the purpose of marshalling public opinion and public effort toward the successful prosecution of the war. Not only is the radio time given for this purpose, but also in many instances, the talent. The Treasury Department has recognized this contribution in tax rulings made by it.

By way of illustration the following are quoted from releases by the Bureau of Internal Revenue, dated September 29, 1942 and November 10, 1942 respectively:

> "Reasonable expenses incurred by companies in advertising and advertising technique to speed the war effort among their own employees, and to cut down accidents and unnecessary absences and inefficiency, will be allowed as deductions. Also reasonable expenditures for advertisements including the promotion of Government objectives in wartime, such as conservation, salvage or the sale of War Bonds, which are signed by the advertiser, will be deductible provided they are reasonable and are not made in an attempt to avoid proper taxation."
>
> • • • • •
>
> "Amounts paid by airplane corporations for advertisements which do not advertise the product of any one company but whose purposes are to stimulate enlistment in the Air Corps, to stimulate bond buying, to aid the scrap campaign, and to increase the efficiency of labor are deductible under Code Sec. 23 (q) as amended by the 1942 Act."

It is essential in the opinion of advertising practitioners that the networks be placed upon a competitive level with newspapers, magazines and billboards in the race for the advertisers' dollar. The advertising practitioner in cooperation with its client, starts preparing for a proposed advertising campaign 12, 6 or 3 months prior to the release or commencement thereof. One of the important elements in the preparation thereof is deciding upon the type of media to be used, whether newspapers, magazines, billboards, and radio or one or more of them or a combination of all of them. Newspapers, magazines, and billboards are in most instances immediately purchasable for use as and when needed. Advertising space purchased or to be purchased from newspapers, magazines or billboards is elastic. It can be expanded or reduced to meet the advertising practitioner's client's need. In broad-

casting, time and facilities are limiting factors, to wit: (1) 24 hours a day, (2) available wave lengths. Pages in newspapers and magazines are not exclusive of one another. That is, various advertisements can appear on the same page at the same time in the same publication. In broadcasting, in a specified locality, definite time and wave lengths must be exclusively assigned to one advertiser. It is essential to the needs of advertising practitioners, and of all their clients, that there be no reduction in the number of radio stations which are now available outlets for the national advertiser in each community, and that there be no impairment of the present availability of these stations for the needs of the national advertiser of these stations.

Section 3.104 of the Commission's order reads as follows:

> "Section 3.104. No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

This places the networks at a serious competitive disadvantage. By way of illustration: an advertising practitioner in preparing advertising plans for a client, must usually spend months of study and research in preparing tentative broadcasting programs and must negotiate with talent, writers and for time, etc. The negotiations with reference to network broadcasting are dependent upon the ability of the network to deliver certain stations. The net-

work must be in a position to inform the advertising practitioner and the advertising practitioner its client, in advance of commitment, what stations and what hours the network can deliver. The advertising practitioner is desirous of purchasing listener circulation for its client. Network audience comes into competition with the assured reader circulation of newspapers and magazines. No advertising practitioner would recommend to its client the purchase of network time without some assurance of circulation outlet. Circulation assurance in network broadcasting means dependable delivery of stations offered for utilization.

No station under the proposed order could agree in advance to make any time available when and if ordered on behalf of a network advertiser. The amount which the advertising practitioner spends for radio talent is substantial. Competent radio talent is scarce. Outstanding radio talent always negotiates on a seller's market. The advertising practitioner would not risk making financial commitments to talent without definite assurance of station delivery. Many of the talent contracts specify the network station coverage. Any change in a network coverage, that is, the omission of an important station in a network, may give to the talent, the desire and right of contract termination. No comparable condition prevails among the competitors of broadcasting. In most instances, space and circulation can be purchased in any quantity for firm delivery. In broadcasting, under the proposed order, no assurances of any kind can be given the advertising practitioner as to the time and stations available within a reasonable negotiating period, giving due consideration to all of the elements which go into the making of a commercial broadcasting program, to wit: script writers and dramatic talent to be hired, music talent to be engaged, rehearsals to be held, consents to use copyrighted literary works to be secured, etc.

It places the purchase of commercial broadcasting from the listener circulation standpoint on a "what is left" basis, rather than on an assured in advance basis such as is sold by the competitors of network broadcasting.

There is nothing in the language of the Federal Communications Act which indicates that Congress intended to place or to give the Commission power to place such a restraining hand upon commercial broadcasting. The advertising practitioners and their clients believe the maintenance of vigorous competition among the networks is in the public interest. The advertising practitioners fear that the effect of the Commission's order will be the extinction of this vigorous competition by the order's tendency to promote a network of the strongest individual stations, leaving the weaker stations without adequate financial support. The growth of networks up to the present time has been based upon program popularity, which has developed the audience of their affiliated stations. Program popularity has had the tendency to build up the strong and weak stations alike, and thus to build up the network as a whole. The breaking down of a network composed of strong and weak stations is not, in the opinion of advertising practitioners, in the best interests of broadcasting. At the present time there is keen competition among the four networks. Each network today is composed of some outstandingly strong stations, plus a group of weaker stations. Today an advertising practitioner is offered, on behalf of its client, network facilities as an integrated unit. Thus the stronger stations carry the weaker stations of the network by the network transmitting to the weaker stations the same powerful audience building programs available to the stronger stations. Under the rules of the Commission this station team-work could be easily disrupted. An advertising practitioner, or its client, or any other party in control of top ranking programs, could set up a network comprised of the stronger stations in each locality. All

that would be required is to link two or more stations by wire. Such a network, by spending substantial sums in program production, could produce additional programs having greater than average audience appeal and thus take away the listeners from the weaker stations. Thus this network, comprising the strongest stations in each locality, would command the most desirable commercial broadcasting business, to the injury—in financial returns and listening audience—of the weaker stations. The result would be that all but the strongest stations would become more and more undesirable for use by advertising practitioners whose clients are national advertisers. The effect upon network broadcasting would probably be that instead of having four national networks, now actively competing among themselves, with the best audience building programs, there would be one all-powerful network confined to a single group of the strongest stations of the country. The weakening of the present networks, through the loss of influential stations, and of top ranking programs, would lessen their ability to serve the smaller stations with audience building programs. A vicious circle might thus be developed injurious to the great bulk of advertising practitioners, advertisers and weaker stations. The super-station network thus created would become indispensable to nationwide broadcasting and would be in a powerfully entrenched monopolistic position, contrary to the "public convenience, interest or necessity."

POINT II

Should such an order, particularly Section 3.104, be issued without specific notice to commercial users of broadcasting time?

Throughout the Federal Communications Commission's report it is conceded that network broadcasting and station broadcasting are financially dependent upon the income derived from commercial users of broadcasting.

The order instituting the investigation is dated March 18, 1938 and the concluding paragraph reads as follows:

> "It is further ordered, that a copy of this order be posted in the office of the Secretary and that a copy of the same be mailed to each licensee of a broadcast station and to each chain and network organization."

No specific order was made directing that notice be given to the commercial users of broadcasting, those most vitally interested in any change affecting the ability of the networks to meet their broadcasting needs—those users who make the continuance of the American system of broadcasting possible by providing the funds that support it. No testimony, as far as we have been able to discover, was given by these interests.

It may be that if the Commission had secured the testimony of the principal commercial users of broadcasting the majority would have come to a conclusion other than that set forth in their opinion.

It is not an answer that the networks stated fairly, and to the best of their belief to the Committee, the requirements, in part or in whole, of the commercial users of broadcasting. We cannot assume the same presentation would have been made by the advertising practitioners if they had had notice of the proposed action, but even so, the same facts coming directly from the tongues of the commercial

users of broadcasting would have been more authoritative and may have been more convincing. In any event no one can say with definiteness that the views of the majority of the members of the Commission would not have been affected by their testimony.

Nor is it an answer that advertising practitioners should have been alert and watched the proceedings before the Commission. There was nothing in the order appointing the investigating committee which indicated in any way that the commercial users of broadcasting would be seriously affected by the order. In fact there was no intimation in any of the public notices that any such order would be issued.

The object of the Commission, to wit, to provide freedom and equality of opportunity to all stations, is laudable, and has the endorsement of all advertising practitioners. But in the public interest it seems to the advertising practitioner that the commercial users should have been notified of the proposed rule and have been specifically invited to attend and give testimony.

Proceedings under statutes, affecting so materially the commercial users of broadcasting, and the social and economic life of the listeners, should provide for specific notice to those so affected. Due process of law implies that a Commission invested with the powers claimed by the Federal Communications Commission should issue orders of the kind hereinbefore referred to only after notifying those directly involved that they are to be affected by the proposed proceeding and invited to give testimony and to be heard. The notice should not be indirect. It should clearly state the object sought to be accomplished and the restrictions which it is contemplated the Commission will place upon the activities of those vitally affected by the proposed order.

Conclusion

It is of the utmost importance to the commercial users of broadcasting that the powers of the Federal Communications Commission be clarified, particularly as to whether the order set forth in this brief adversely affects public interest, convenience or necessity. We believe they should be clarified by the Trial Court after hearing the testimony of all those having a major interest in broadcasting, and it is for this reason that we join in that part of the appellants' prayer for relief asking that the issues raised by the complaint be tried.

Respectfully submitted,

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of Advertising Agencies
as *Amicus Curiae*,
17 John Street,
New York City, N. Y.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG CARLSON TELEPHONE MANUFACTURING COMPANY, *Appellants*, v. UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Appellees*.	No. 554
COLUMBIA BROADCASTING SYSTEM, INC., *Appellant*, v. UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Appellees*.	No. 555

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

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BRIEF FOR AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

Preliminary Statement

The case comes before this Court on appeal from the decision of a statutory three-judge district court granting the motion of the respondent, the Federal Communications Commission, for summary judgment in two actions brought by the appellant networks and two affiliates of

one of them to "annul" certain Regulations* of the Commission and to enjoin their enforcement.

The American Civil Liberties Union, a non-partisan, non-sectarian organization, with a membership of thousands of persons in all States of the Union, has for the past two decades or more endeavored to carry out its object as stated in its charter—namely, "to maintain throughout the United States and its possessions the rights of free speech, free press, free assemblage and other civil rights, and to take legitimate action in furtherance of such purposes."

The Regulations which the appellants are seeking to annul and enjoin have, in our opinion, a clear and direct relation to freedom of speech over the air since they are designed to secure that diversity of control in the absence of which such freedom is seriously jeopardized. The Union therefore files this brief as *amicus curiae*. We shall concern ourselves with the relation of the challenged Regulations to diversity of control and therefore of expression over the radio and to the authority of the Commission to give consideration to the promotion of such diversity in exercising its licensing powers.

The Opinion Below

Judge Learned Hand, speaking for the unanimous Court below, held that the Commission had the power to promulgate the Regulations complained of and that they were neither "arbitrary or capricious". With reference to the charge of the appellants that the Regulations interfered with their freedom of speech in violation of the First Amendment, Judge Hand pointed out that it was precisely

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* Regulations 3.101 to 3.108 inclusive, adopted by the Federal Communications Commission on May 2, 1941, amended Oct. 11, 1941 and promulgated in connection with the Commission's "Report on Chain Broadcasting".

"the public interest * * * in free speech itself" which dictated their promulgation. By reason of the network practices and contractual arrangements which are the subject of the Regulations, the Commission, said Judge Hand, was in a position where it had to choose between the interests of "listeners", "licensees who may prefer to be freer of the 'networks'" and "future competing 'networks'" on the one hand and the present "networks" and their "affiliates" on the other (R. 529). By issuing Regulations aimed against those practices and arrangements the Commission elected to favor the first group of interests and made clear its belief that greater freedom of expression over the air was served thereby. As Judge Hand indicates, the Commission would equally have made a choice as directly impinging on freedom of speech had it not issued the Regulations, allowed the *status quo* to remain undisturbed, and favored the interests of the present networks and their affiliates at the expense of the other groups mentioned, which include the public. Compare *Miller* v. *Schoene* (276 U. S. 272). The American Civil Liberties Union agrees with the choice represented by the Regulations and believes that they are in the direction of greater freedom of speech over the air.

POINT I

The public interest requires the removal of artificial impediments to diversity over the radio. The challenged Regulations are appropriate to that end.

A. The Public Interest in Diversity Over the Radio

Competition in the field of commodities has always been recognized as a cardinal principle of our economic system. Competition in the field of ideas is even more fundamental to our democratic way of life. Unless par-

ticular ideas have competitors in the market place of thought, or at the very least, unless there is a potentiality for such competition, there can be no freedom of thought or expression. Freedom implies access to diverse points of view and the right to pick and choose among them. Since the American Civil Liberties Union is dedicated to the preservation of freedom of thought and expression it considers it a duty to sponsor developments which look in the direction of encouraging such diversity and of discouraging bottleneck contractual devices. The Union recognizes the danger that a public demand for government censorship of radio may be created by a too great concentration of control in a few private hands, and believes that freedom from censorship is assured only when ideas are in the freest possible competition with each other.

When the Bill of Rights with its guarantees of free speech and free press first became a part of our national pattern, there was scant need of governmental regulation looking in the direction of diversity of sources of information. Communities were small enough so that democracy had a plain everyday meaning and town meetings were the order of the day. Newspapers were small and, as compared with the population, plentiful; unlike today, it did not require the investment of millions of dollars to start one. Pamphleteering was an important mode of forming public opinion. And above all, living was on a scale compact enough to permit of direct first hand knowledge of most of the events of importance to the average man, and what was being thought about those events. An instrumentality which would make it possible for one man orally to address 130,000,000 at the same time had not even been conceived of.

Guarantees of freedom do not operate *in vacuo* but take on meaning only in the light of the particular setting in which they are applied. The setting today is very

different from that which prevailed in 1789. Virtually none of us today has or can have direct first hand knowledge even of the issues which most importantly affect us. Town meetings are for the most part regarded as relics of the horse and buggy days. Even the public rostrum has lost most of its former significance. Because of the evolution of modern modes of transportation and communication, the emphasis has shifted from local to national and international problems. This very universality of our concerns makes it more than ever important that we have access to the greatest possible diversity of sources of information. All other channels of communication have paled into comparative obscurity alongside of the three mighty pipe lines of knowledge which today hourly feed into the market place of thought the fare which nourishes the minds not of hundreds, nor thousands but literally of millions of people: the newspapers, the motion pictures and the radio. But, for every individual who listens to a street-corner address there are tens of thousands who listen to a radio speech.

Because of the overwhelming coverage of the radio in terms both of matters broadcast and listening audience—a coverage which dwarfs every other form of communication ever known to man—diversity of control over what goes over the air waves is particularly vital. Bad as it might be for ten or twelve or twenty men to have the absolute power to determine what we may hear in our local meeting halls, it would be far more pernicious for a like number to dominate what goes over the air waves. Yet the Report of the Federal Communications Commission on the basis of which the Regulations challenged in this case were issued, discloses a narrowing spiral of concentration of control in a few hands of what the American public should hear over the radio. Each of the devices condemned by the Commission has for its aim

domination by the networks in New York City of what shall go over the wave lengths of the radio stations scattered over the whole of the United States. To the extent that such domination is achieved, the right to listen, which for most people today is the significant sector of the right of free speech, is in the hands of a dwindling group of private entrepreneurs.

In what follows it must be borne in mind that there are only a limited number of wave lengths available for standard broadcasting purposes. By reason of the limitations of the medium, the number of entities which can enjoy the high privilege of holding licenses for radio stations is sharply restricted. Faced with this scientific necessity, Congress delegated to the Federal Communications Commission the task of allocating the available wave lengths according to the dictates of "public interest, convenience or necessity" and thus implicitly enjoined on the Commission the duty of maintaining competition over the air. If there were an unlimited number of wave lengths of equal power available for use, it may be that free competition itself would serve to prevent undue concentration of control in the hands of a few. But here there are no effective substitutes; competitors cannot suddenly spring up to challenge the position of the established chains. In effect what the Regulations of the Commission seek to do is to create the kind of competitive situation which would normally exist if substitutes and new competition were possible. Incidentally, it may be noted in passing that the percentage of profit, *i.e.*, return on investment made by the networks, is so large as to indicate still further that a truly competitive situation does not exist. If it did, it may be presumed that competition would be glad to enter the field even for a much lower return.

Again—in what follows we are making no comment or criticism as to the merits or demerits of the persons who

now dominate the radio pipe lines into the market of thought. From our point of view, we must assume that they are as wise and fair as could be selected by any other method. We are concerned only with the need for diversity of control over the air waves so that the listening public may have access to diverse programs and ideas. We would oppose government domination of broadcasting at least as strongly as any other centralization of the power over the radio. Being an organization devoted to the preservation of freedom of thought and expression, we are concerned with only one thing—that what goes over those pipe lines is the product of as many minds as possible. We object to private parties entering into restrictive covenants which impinge upon our capacity to hear. Only if we have access to many and diverse sources of knowledge, information and belief, can we exercise that prerogative of our democracy known as reaching our own conclusions as opposed to accepting on faith the conclusions of others. Moreover, it is important that local issues as well as national and international ones be the focus of discussion over the radio; democracy also resides in local communities. For this reason, too, control of the air waves should not be too concentrated in the hands of nation-wide entities far removed from matters of purely local concern.

To the extent that the challenged Regulations of the Commission are directed to securing diversity, we wish to go on record as favoring them. We shall now point out the integral relationship of each of the Regulations to this essential problem.

B. The Challenged Regulations Are in Aid of Diversity Over the Radio

1. In General

There are four major national networks: The Red network of the National Broadcasting Company, the Blue

network of the Blue Network Company,* the Columbia Broadcasting System and the Mutual Broadcasting System. The "Report on Chain Broadcasting" issued by the Federal Communications Commission in May of 1941 (Commission Order No. 37, Docket No. 5060), fully summarized in the Commission's brief, reveals that prevailing conditions as to ownership of networks and stations, and contractual terms of affiliation between networks and stations today head up into three chief results all immensely damaging to that diversity which is vital to the preservation of free speech over the air. First, they render it virtually impossible for any new network to become established; second, by fiat, they keep substantial portions of the American people from having any access to important programs; and third, they operate with increasing efficacy to wrest from local radio stations their selective functions, thereby concentrating domination of the nationwide air waves in the hands of the chains in New York City. As the Report shows, this tendency away from diversification toward concentration has been increasing by geometric progression as new stations have been contractually dominated by the chains and as the terms of affiliation have become increasingly stringent. It seems reasonable to assume that unless the Commission steps in now to prevent still further centralization in the hands of the networks, the American people will have to choose between control over the air waves by a few corporation officials and control over the air waves by a few government officials. Both alternatives are destructive of a free market in thought. It is believed that the principles adopted by the Commission are well designed to avoid both evils and to effectuate that competition for control of what goes over the air waves which

* Both these companies are subsidiaries of the Radio Corporation of America.

it was one of the basic purposes of the Communications Act to preserve.

Before summarizing the content and scope of the challenged Regulations, we respectfully submit that the prohibitions they embody are analogous to, and indeed in *pari materia*, with the general federal anti-trust statutes, the Sherman Anti-Trust Act and the Clayton Act.

The provisions of the organic Communications Act are a piece with the predecessor anti-monopoly statutes of general application to industry, commerce, and trade, and incorporate the prohibitions against the historic modes of restraint of trade and monopolistic practices. Sections of the Communications Act explicitly and in terms proscribe monopoly and monopolistic practices in radio communication. See, *e.g.*, 47 *U. S. C. A. 311, 313, 314.* These statutory provisions project into the radio field principles familiar in the general anti-trust policy.

It is indubitable, as this Court in construing the Communications Act has authoritatively stated, that Congress in framing it intended that restraints of trade, monopolistic practices, and unfair competition should be outlawed and prohibited.

Thus, in *Federal Communications Commission* v. *Sanders*, 309 U. S. 470, 476, this Court stated that the supposed granting of monopolistic power to a broadcasting company is expressly negatived by the Act. Earlier in *Federal Communications* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, the Court had said:

> "Congress moved under the spur of a widespread fear that in the absence of government control the public interest might be subordinated to monopolistic domination in the broadcasting field."

It follows inexorably that under the anti-monopoly provisions of the Communications Act (one of a series of

cognate federal statutes to prevent and prohibit monopoly, monopolistic practices, and restraints of trade) and by reason of the clearly stated principles enunciated by this Court in construing that Act well recognized evils, familiar in anti-trust history, such as tying clauses and exclusive dealing (see Sec. 3 of the Clayton Act), boycotting, involuntary restraints of trade directed against third parties, and similar discriminatory tactics destroying competition and freedom of enterprise are within the prohibitions of the Act and that it is appropriately within the Federal Communications Commission's power and authority to promulgate regulations prohibiting such activities.

Directly analogous to the relationship of the anti-monopoly provisions of the Communications Act to the general Congressional anti-trust policy, is the incorporation by reference in proceedings under the Federal Trade Commission Act of previous federal anti-trust legislation. In *Federal Trade Commission* v. *Beechnut Packing*, 257 U. S. 441, at page 453, precedents under the Sherman Act were employed to show a declaration of public policy, to be considered in determining what were unfair methods of competition which the Federal Trade Commission was empowered to condemn and suppress. The Communications Act, like the Trade Commission Act, was intended by Congress to supplement previous anti-trust legislation, and condemnation of the well known restraints of trade and monopolistic practices, familiar in the anti-trust cases, must equally be carried over into the anti-monopoly provisions of the Communications Act in the establishment of the criterion of the "interest, convenience or necessity" which governs the exercise of the licensing power.

2, The Challenged Regulations

3.101 and 3.102

The first two of the challenged rulings relate to exclusivity. 3.101 declares that it shall be the policy of the Commission not to grant a license to standard broadcast stations which contract with a network to boycott the programs of any other network. Most C. B. S. contracts contain a clause of the type here condemned. Although nominally N. B. C. also objects to the Commission's declaration of policy on these clauses, actually its complaint does not attack the Commission's report in this regard and if the ruling of the Commission were adhered to, it would not necessitate any change in the N. B. C. contracts. This fact alone refutes Columbia's contention that the inclusion of such a clause is necessary to effective network operation.

The narrowing effect of such a clause on the range of programs available to the residents of a particular locality can be and often is considerable. For example in cities where there are less than four stations (and there are some 45 such cities with populations of 50,000 or more) the listening audience would be cut off entirely from the programs of one or more of the existing national networks if each of them insisted on the inclusion of such a clause in its contract with its local affiliate. Under the typical Columbia contract, a local Columbia station would not be free to carry the broadcasts of a commentator who is on another network between 10 and 10:15 P. M., even if that local station did not choose to carry the regular Columbia broadcast at that time and even if the other network had no station in that area. This blackout on the commentator would be the result not of the impact of audience reaction but of restrictive covenants which pre-

clude the possibility of an audience test in the particular locality.

Stated in other terms "Information Please" would be unable to get to local audiences where the particular network has no affiliate, unless a station existed in the area willing to be bound by the long term network affiliation contract—in effect covering innumerable other programs as well. This is block booking of ideas at its worst. These clauses which prohibit local stations from accepting the broadcasts of other networks proceed on a boycott ideology where the public interest is not served by a boycott. They are in fact ukases issued by the networks against free competition.

Regulation 3.102 covers another aspect of exclusivity. It declares that no license shall be granted to a station which contracts with a network that the network will not supply a program to any other station in the area, regardless of whether its own affiliate rejects or accepts its programs. Under such a clause, for example, if the local C. B. S. affiliate in a particular area does not choose to carry the Philharmonic broadcasts (being sustaining, such broadcasts can be rejected at will) C. B. S. is none the less automatically debarred from allowing any other station in that area to have these broadcasts. Again, the incursion on the right to listen is clear. The clauses here criticized can and have in actual practice so operated that a particular network program has been entirely excluded from a given locality. The Regulations take cognizance of the chief reason advanced by the networks for the inclusion of such clauses, namely, the necessity for regular network affiliation, for they permit the networks to contract to give a first refusal of their programs to their own affiliates.

These exclusivity clauses proceed out of the desire of networks and their affiliated stations to restrict competi-

tion. Yet, these stations are the beneficiaries of government licenses under an Act founded on the principle of competition over the air. If a network can thus make contractual provisions a substitute for superiority in the market place, its incentive to furnish the best programs will be correspondingly diminished. At the same time there will continue to be privately promulgated blackouts in whole areas on desirable broadcasts. In the final analysis, such clauses are reminiscent of the exclusive dealing arrangements condemned by the Clayton Act. How much more dangerous are such contracts when entered into by dealers in ideas, especially when their number is limited not by the ordinary interplay of the forces of competition but by scientific necessity. Such contractual devices to keep programs from being available to large segments of the listening public are not supported by any considerations of public interest.

3.103

The third of the challenged Regulations provides that no station shall be licensed which makes a contract of affiliation with a network binding it for more than two years. Clearly the purpose of the typical N. B. C. and C. B. S. provision binding their affiliated stations for five years was to restrain competition among networks in the acquisition of affiliates. These long-term contracts are especially destructive of diversity since they contain the other contractual provisions also frowned upon by the Regulations. By these contracts the networks have the power to dominate their local affiliates for five years and to this extent the local stations have abdicated their responsibility for independent program selection. The five-year arrangement is particularly anomalous because station licenses are only granted for a period of two years and the networks themselves are typically bound only for one year by their contracts with affiliates.

3.104 and 3.105

The abdication of that local responsibility which is an indispensable earmark of diversity, is further marked by the so-called option time provisions in network affiliation contracts, provisions condemned by Regulation 3.104. Under these clauses the networks may on 28 days' notice clear off local stations, during the most important broadcast hours of the day, programs which those stations have selected and substitute therefor programs which the networks have seen fit to contract for. The typical option time provisions mean that any program of a local affiliate presumably selected by it because deemed of local value is subject to cancellation on 28 days' notice in favor of any program contracted for by the national network without regard for local needs. The networks have maintained that such clauses are necessary if radio is to compete with other national advertising media. The amended Regulations of the Commission take this contention into account: they divide the broadcast day into four parts and require that local stations reserve to themselves at least two hours in every part. As additional protection to the local stations, the Commission is requiring that the period of notice be extended from 28 to 56 days, and it is stipulated that the options can be exercised only to remove non-network broadcasts but may not be used to displace the programs of other networks already contracted for. It is submitted that if the option time provisions now in standard affiliation contracts are not modified at least as much as the Regulations of the Commission would call for, the local audience radio fare will be determined by the power of New York groups acting without regard to specific local needs. In market terms these option clauses are the equivalent of stock market "puts." The more successful the networks in obtaining advertising contracts, the

fewer the minds selecting the material which issues from the microphones of the country.

As a corollary to the Regulation cutting down on option time provisions, the Federal Communications Commission by Regulation 3.105 enunciates the principle that stations must reserve the right under their affiliation contracts to reject unsatisfactory and unsuitable programs. This is another move to prevent abdication of responsibility.

3.106

The sixth of the challenged Regulations (3.106) prescribes a policy against one network having more than one station in the same area or any station at all in an area where competition would be substantially restrained by network ownership of a station.

Operation by the same entity of more than one station in the same area cuts down on a diversity already sharply limited by mechanical necessity. Unless the Commission has power to avert multiple ownership in the same area, there is a further invitation toward the gradual swallowing up of more and more individual stations by a few networks. In those localities where the available stations are too few or too weak adequately to serve local interests certainly public policy requires that the station licenses be not granted to absentee landlords, to whom the station would be a mere link in a chain rather than an entity in itself.

The remaining two Regulations Numbers 3.107 and 3.108 are not realistically involved in this proceeding.

POINT II

The challenged Regulations are within the statutory authority of the Commission.

The policies declared by the Federal Communications Commission in the Regulations at bar are thus designed in each instance to dilute concentration of control over the radio spectrum, thereby promoting diversity in the communication of ideas by means of the radio. The ultimate question of law is whether the Federal Communications Commission has authority under its constitutive Act to posit increased competition and diversity as one at least of the major criteria in its supervision of the air waves. We think, as did the Court below, that that question must be answered in the affirmative.

Focal to the entire Act is the licensing power. Congress has declared that it should be exercised in the light of "public interest, convenience or necessity" (§309 (a)). This criterion, while not "so indefinite as to confer an unlimited power,"* has a "flexibility"† which must be taken into account when the question is whether the agents of Congress have so far exceeded their power as to call for judicial veto.

It is moreover established that the "interest, convenience or necessity" which is to be served by the Commission is that of the "public," not that of the owners of radio stations and certainly not that of broadcasting chains which merely purvey services to the radio stations. This principle is illuminated by *Federal Communications Comm. v. Sanders Bros.*, 309 U. S. 470, 475, where Mr. Justice ROBERTS remarked that "Plainly it is not the pur-

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* HUGHES, C.J., in *Federal Radio Comm. v. Nelson Bros. B & M Co.*, 289 U. S. 266, 285.

† FRANKFURTER, J., in *Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 138.

pose of the Act to protect a licensee against competition but to protect the public."

With its eye single to the *public* interest, and with a wide range of discretion in selecting means for safeguarding that interest, the Commission could validly determine that a larger degree of competition is essential to the public interest, that certain existing practices tend unduly to stifle diversity, and that abandonment of these practices should be made a condition of the grant of the privilege to use a facility in the public demesne.

This conclusion is reinforced by the basic structure of the Act as well as a plenitude of particular provisions. Congress could have declared radio stations to be public carriers and thereupon impressed comprehensive regulation on most, if not all, of their activities (including the rates they charge) as a substitute for the correctives of competition. It preferred to rely upon the correctives of competition. But this was necessarily based on the assumption that competition would be as free as the scientific necessities of the industry permit. And the Commission was implicitly charged with the duty of maintaining that freedom. See Federal Communications Act, §§151, 153 (b), 301, 303 (g), (i), 304, 307 (b), (d), 309 (a), (b) (1) (2), 310 (b), 311, 312, 313, 314. We have seen above that the policies towards stimulating competition (and therefore diversity of expression) implicit in the Regulations are not extravagant or extreme; they are paralleled by the traditional policies of our anti-trust laws and by the host of modern legislative approaches to problems of concentration of control such as interlocking directorates, ownership by banks of security affiliates, public utility holding companies, etc. Finally, the Commission does not intend to enforce its policies as wooden rules of thumb. It has declared its intention to mitigate these policies

in particular situations where the facts warrant or require it. Thus in its opinion on rehearing (October 11, 1941) the Commission said:

> "The Commission stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances the chain broadcasting regulations should not be applicable to any particular situation."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 554-555.—October Term, 1942.

National Broadcasting Company, Inc., and Stromberg-Carlson Telephone Manufacturing Company, Appellants,
554 *vs.*
The United States of America, Federal Communications Commission, and Mutual Broadcasting System, Inc.

Columbia Broadcasting System, Inc., Appellant,
555 *vs.*
The United States of America, Federal Communications Commission, and Mutual Broadcasting System, Inc.

Appeals from the District Court of the United States for the Southern District of New York.

[May 10, 1943.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In view of our dependence upon regulated private enterprise in discharging the far-reaching rôle which radio plays in our society, a somewhat detailed exposition of the history of the present controversy and the issues which it raises is appropriate.

These suits were brought on October 30, 1941, to enjoin the enforcement of the Chain Broadcasting Regulations promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941. We held last Term in *Columbia System* v. *U. S.*, 316 U. S. 407, and *Nat. Broadcasting Co.* v. *U. S.*, 316 U. S. 447, that the suits could be maintained under § 402(a) of the Communications Act of 1934, 48 Stat. 1093, 47 U. S. C. § 402(a) (incorporating by reference the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 28 U. S. C. § 47), and that the decrees of the District Court dismissing the suits for want of jurisdiction should therefore be reversed. On remand the District Court granted the Government's motions for summary judgment

and dismissed the suits on the merits. 47 F. Supp. 940. The cases are now here on appeal. 28 U. S. C. § 47. Since they raise substantially the same issues and were argued together, we shall deal with both cases in a single opinion.

On March 18, 1938, the Commission undertook a comprehensive investigation to determine whether special regulations applicable to radio stations engaged in chain broadcasting[1] were required in the "public interest, convenience, or necessity". The Commission's order directed that inquiry be made, *inter alia*, in the following specific matters: the number of stations licensed to or affiliated with networks, and the amount of station time used or controlled by networks; the contractual rights and obligations of stations under their agreements with networks; the scope of network agreements containing exclusive affiliation provisions and restricting the network from affiliating with other stations in the same area; the rights and obligations of stations with respect to network advertisers; the nature of the program service rendered by stations licensed to networks; the policies of networks with respect to character of programs, diversification, and accommodation to the particular requirements of the areas served by the affiliated stations; the extent to which affiliated stations exercise control over programs, advertising contracts, and related matters; the nature and extent of network program duplication by stations serving the same area; the extent to which particular networks have exclusive coverage in some areas; the competitive practices of stations engaged in chain broadcasting; the effect of chain broadcasting upon stations not licensed to or affiliated with networks; practices or agreements in restraint of trade, or in furtherance of monopoly, in connection with chain broadcasting; and the scope of concentration of control over stations, locally, regionally, or nationally, through contracts, common ownership, or other means.

On April 6, 1938, a committee of three Commissioners was designated to hold hearings and make recommendations to the full Commission. This committee held public hearings for 73 days over a period of six months, from November 14, 1938, to May 19, 1939. Order No. 37, announcing the investigation and specifying

[1] Chain broadcasting is defined in § 3(p) of the Communications Act of 1934 as the "simultaneous broadcasting of an identical program by two or more connected stations". In actual practice, programs are transmitted by wire, usually leased telephone lines, from their point of origination to each station in the network for simultaneous broadcast over the air.

the particular matters which would be explored at the hearings, was published in the Federal Register, 3 Fed. Reg. 637, and copies were sent to every station licensee and network organization. Notices of the hearings were also sent to these parties. Station licensees, national and regional networks, and transcription and recording companies were invited to appear and give evidence. Other persons who sought to appear were afforded an opportunity to testify. 96 witnesses were heard by the committee, 45 of whom were called by the national networks. The evidence covers 27 volumes, including over 8,000 pages of transcript and more than 700 exhibits. The testimony of the witnesses called by the national networks fills more than 6,000 pages, the equivalent of 46 hearing days.

The committee submitted a report to the Commission on June 12, 1940, stating its findings and recommendations. Thereafter, briefs on behalf of the networks and other interested parties were filed before the full Commission, and on November 28, 1940, the Commission issued proposed regulations which the parties were requested to consider in the oral arguments held on December 2 and 3, 1940. These proposed regulations dealt with the same matters as those covered by the regulations eventually adopted by the Commission. On January 2, 1941, each of the national networks filed a supplementary brief discussing at length the questions raised by the committee report and the proposed regulations.

On May 2, 1941, the Commission issued its Report on Chain Broadcasting, setting forth its findings and conclusions upon the matters explored in the investigation, together with an order adopting the Regulations here assailed. Two of the seven members of the Commission dissented from this action. The effective date of the Regulations was deferred for 90 days with respect to existing contracts and arrangements of network-operated stations, and subsequently the effective date was thrice again postponed. On August 14, 1941, the Mutual Broadcasting Company petitioned the Commission to amend two of the Regulations. In considering this petition the Commission invited interested parties to submit their views. Briefs were filed on behalf of all of the national networks, and oral argument was had before the Commission on September 12, 1941. And on October 11, 1941, the Commission (again with two members dissenting) issued a Supplemental Report, together with an order amending three Regulations. Simultaneously, the effective date of the Regulations

was postponed until November 15, 1941, and provision was made for further postponements from time to time if necessary to permit the orderly adjustment of existing arrangements. Since October 30, 1941, when the present suits were filed, the enforcement of the Regulations has been stayed either voluntarily by the Commission or by order of court.

Such is the history of the Chain Broadcasting Regulations. We turn now to the Regulations themselves, illumined by the practices in the radio industry disclosed by the Commission's investigation. The Regulations, which the Commission characterized in its Report as "the expression of the general policy we will follow in exercising our licensing power", are addressed in terms to station licensees and applicants for station licenses. They provide, in general, that no licenses shall be granted to stations or applicants having specified relationships with networks. Each Regulation is directed at a particular practice found by the Commission to be detrimental to the "public interest", and we shall consider them *seriatim*. In doing so, however, we do not overlook the admonition of the Commission that the Regulations as well as the network practices at which they are aimed are interrelated: "In considering above the network practices which necessitate the regulations we are adopting, we have taken each practice singly, and have shown that even in isolation each warrants the regulation addressed to it. But the various practices we have considered do not operate in isolation; they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each taken singly." (Report, p. 75.)

The Commission found that at the end of 1938 there were 660 commercial stations in the United States, and that 341 of these were affiliated with national networks. 135 stations were affiliated exclusively with the National Broadcasting Company, Inc., known in the industry as NBC, which operated two national networks, the "Red" and the "Blue". NBC was also the licensee of 10 stations, including 7 which operated on so-called clear channels with the maximum power available, 50 kilowatts; in addition, NBC operated 5 other stations, 4 of which had power of 50 kilowatts, under management contracts with their licensees. 102 stations were affiliated exclusively with the Columbia Broadcasting System, Inc., which was also the licensee of 8 stations, 7 of which were clear-channel stations operating with power of 50 kilowatts.

74 stations were under exclusive affiliation with the Mutual Broadcasting System, Inc. In addition, 25 stations were affiliated with both NBC and Mutual, and 5 with both CBS and Mutual. These figures, the Commission noted, did not accurately reflect the relative prominence of the three companies; since the stations affiliated with Mutual were, generally speaking, less desirable in frequency, power, and coverage. It pointed out that the stations affiliated with the national networks utilized more than 97% of the total night-time broadcasting power of all the stations in the country. NBC and CBS together controlled more than 85% of the total night-time wattage, and the broadcast business of the three national network companies amounted to almost half of the total business of all stations in the United States.

The Commission recognized that network broadcasting had played and was continuing to play an important part in the development of radio. "The growth and development of chain broadcasting", it stated, "found its impetus in the desire to give widespread coverage to programs which otherwise would not be heard beyond the reception area of a single station. Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or regional significance which would otherwise have coverage only in the locality of origin. Furthermore, the access to greatly enlarged audiences made possible by chain broadcasting has been a strong incentive to advertisers to finance the production of expensive programs. . . . But the fact that the chain broadcasting method brings benefits and advantages to both the listening public and to broadcast station licensees does not mean that the prevailing practices and policies of the networks and their outlets are sound in all respects, or that they should not be altered. The Commission's duty under the Communications Act of 1934 is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated." (Report, p. 4.)

The Commission found that eight network abuses were amenable to correction within the powers granted it by Congress:

Regulation 3.101—Exclusive affiliation of station. The Commission found that the network affiliation agreements of NBC and CBS customarily contained a provision which prevented the sta-

tion from broadcasting the programs of any other network. The effect of this provision was to hinder the growth of new networks, to deprive the listening public in many areas of service to which they were entitled, and to prevent station licensees from exercising their statutory duty of determining which programs would best serve the needs of their community. The Commission observed that in areas where all the stations were under exclusive contract to either NBC or CBS, the public was deprived of the opportunity to hear programs presented by Mutual. To take a case cited in the Report: In the fall of 1939 Mutual obtained the exclusive right to broadcast the World Series baseball games. It offered this program of outstanding national interest to stations throughout the country, including NBC and CBS affiliates in communities having no other stations. CBS and NBC immediately invoked the "exclusive affiliation" clauses of their agreements with these stations, and as a result thousands of persons in many sections of the country were unable to hear the broadcasts of the games.

"Restraints having this effect", the Commission observed, "are to be condemned as contrary to the public interest irrespective of whether it be assumed that Mutual programs are of equal, superior, or inferior quality. The important consideration is that station licensees are denied freedom to choose the programs which they believe best suited to their needs; in this manner the duty of a station licensee to operate in the public interest is defeated. . . . Our conclusion is that the disadvantages resulting from these exclusive arrangements far outweigh any advantages. A licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable, and which, by closing the door of opportunity in the network field, adversely affect the program structure of the entire industry." (Report, pp. 52, 57.) Accordingly, the Commission adopted Regulation 3.101, providing as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization."

Regulation 3.102—Territorial exclusivity. The Commission found another type of "exclusivity" provision in network affiliation

agreements whereby the network bound itself not to sell programs to any other station in the same area. The effect of this provision, designed to protect the affiliate from the competition of other stations serving the same territory, was to deprive the listening public of many programs that might otherwise be available. If an affiliated station rejected a network program, the "territorial exclusivity" clause of its affiliation agreement prevented the network from offering the program to other stations in the area. For example, Mutual presented a popular program, known as "The American Forum of the Air", in which prominent persons discussed topics of general interest. None of the Mutual stations in the Buffalo area decided to carry the program, and a Buffalo station not affiliated with Mutual attempted to obtain the program for its listeners. These efforts failed, however, on account of the "territorial exclusivity" provision in Mutual's agreements with its outlets. The result was that this program was not available to the people of Buffalo.

The Commission concluded that "It is not in the public interest for the listening audience in an area to be deprived of network programs not carried by one station where other stations in that area are ready and willing to broadcast the programs. It is as much against the public interest for a network affiliate to enter into a contractual arrangement which prevents another station from carrying a network program as it would be for it to drown out that program by electrical interference." (Report, p. 59.)

Recognizing that the "territorial exclusivity" clause was unobjectionable in so far as it sought to prevent duplication of programs in the same area, the Commission limited itself to the situations in which the clause impaired the ability of the licensee to broadcast programs otherwise available. Regulation 3.102, promulgated to remedy this particular evil, provides as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call

in its primary service area upon the programs of the network organization."

Regulation 3.103—Term of affiliation. The standard NBC and CBS affiliation contracts bound the station for a period of five years, with the network having the exclusive right to terminate the contracts upon one year's notice. The Commission, relying upon § 307(d) of the Communications Act of 1934, under which no license to operate a broadcast station can be granted for a longer term than three years, found the five-year affiliation term to be contrary to the policy of the Act: "Regardless of any changes that may occur in the economic, political, or social life of the Nation or of the community in which the station is located, CBS and NBC affiliates are bound by contract to continue broadcasting the network programs of only one network for 5 years. The licensee is so bound even though the policy and caliber of programs of the network may deteriorate greatly. The future necessities of the station and of the community are not considered. The station licensee is unable to follow his conception of the public interest until the end of the 5-year contract." (Report, p. 61.) The Commission concluded that under contracts binding the affiliates for five years, "stations become parties to arrangements which deprive the public of the improved service it might otherwise derive from competition in the network field; and that a station is not operating in the public interest when it so limits its freedom of action." (Report, p. 62.) Accordingly, the Commission adopted Regulation 3.103: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years:[2] *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period."

Regulation 3.104—Option time. The Commission found that network affiliation contracts usually contained so-called network optional time clauses. Under these provisions the network could upon 28 days' notice call upon its affiliates to carry a commercial

[2] Station licenses issued by the Commission normally last two years. Section 3.34 of the Commission's Rules and Regulations governing Standard and High-Frequency Broadcast Stations, as amended October 14, 1941.

program during any of the hours specified in the agreement as "network optional time". For CBS affiliates "network optional time" meant the entire broadcast day. For 29 outlets of NBC on the Pacific Coast, it also covered the entire broadcast day; for substantially all of the other NBC affiliates, it included 8½ hours on weekdays and 8 hours on Sundays. Mutual's contracts with about half of its affiliates contained such a provision, giving the network optional time for 3 or 4 hours on weekdays and 6 hours on Sundays.

In the Commission's judgment these optional time provisions, in addition to imposing serious obstacles in the path of new networks, hindered stations in developing a local program service. The exercise by the networks of their options over the station's time tended to prevent regular scheduling of local programs at desirable hours. The Commission found that "shifting a local commercial program may seriously interfere with the efforts of a [local] sponsor to build up a regular listening audience at a definite hour, and the long-term advertising contract becomes a highly dubious project. This hampers the efforts of the station to develop local commercial programs and affects adversely its ability to give the public good program service . . . . A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest. We conclude that national network time options have restricted the freedom of station licensees and hampered their efforts to broadcast local commercial programs, the programs of other national networks, and national spot transcriptions. We believe that these considerations far outweigh any supposed advantages from 'stability' of network operations under time options. We find that the optioning of time by licensee stations has operated against the public interest." (Report, pp. 63, 65.)

The Commission undertook to preserve the advantages of option time, as a device for "stabilizing" the industry, without unduly impairing the ability of local stations to develop local program service. Regulation 3.104 called for the modification of the option-

time provision in three respects: the minimum notice period for exercise of the option could not be less than 56 days; the number of hours which could be optioned was limited; and specific restrictions were placed upon exercise of the option to the disadvantage of other networks. The text of the Regulation follows: "No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a.m. to 1:00 p.m.; 1:00 p.m. to 6:00 p.m.; 6:00 p.m. to 11:00 p.m.; 11:00 p.m. to 8:00 a.m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

Regulation 3.105—Right to reject programs. The Commission found that most network affiliation contracts contained a clause defining the right of the station to reject network commercial programs. The NBC contracts provided simply that the station "may reject a network program the broadcasting of which would not be in the public interest, convenience, and necessity." NBC required a licensee who rejected a program to "be able to support his contention that what he has done has been more in the public interest than had he carried on the network program". Similarly, the CBS contracts provided that if the station had "reasonable objection to any sponsored program or the product advertised thereon as not being in the public interest, the station may, on 3 weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the station shall be satisfied".

While seeming in the abstract to be fair, these provisions, according to the Commission's finding, did not sufficiently protect the "public interest". As a practical matter, the licensee could not determine in advance whether the broadcasting of any particular network program would or would not be in the public interest. "It is obvious that from such skeletal information [as the networks submitted to the stations prior to the broadcasts] the station cannot determine in advance whether the program is in the public interest, nor can it ascertain whether or not parts of the program are in one way or another offensive. In practice,

if not in theory, stations affiliated with networks have delegated to the networks a large part of their programming functions. In many instances, moreover, the network further delegates the actual production of programs to advertising agencies. These agencies are far more than mere brokers or intermediaries between the network and the advertiser. To an ever-increasing extent, these agencies actually exercise the function of program production. Thus it is frequently neither the station nor the network, but rather the advertising agency, which determines what broadcast programs shall contain. Under such circumstances, it is especially important that individual stations, if they are to operate in the public interest, should have the practical opportunity as well as the contractual right to reject network programs. . . . .

"It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest. We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communcations Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory." (Report, pp. 39, 66.)

The Commission undertook in Regulation 3.105 to formulate the obligations of licensees with respect to supervision over programs: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance."

Regulation 3.106—Network ownership of stations. The Commission found that NBC, in addition to its network operations, was the licensee of 10 stations, 2 each in New York, Chicago, Washington, and San Francisco, 1 in Denver, and 1 in Cleveland. CBS was the licensee of 8 stations, 1 in each of these cities: New York, Chicago, Washington, Boston, Minneapolis, St. Louis, Charlotte, and Los Angeles. These 18 stations owned by NBC and CBS, the Commission observed, were among the most powerful and desirable in the country, and were permanently inaccessible to competing networks. "Competition among networks for these facilities is nonexistent, as they are completely removed from the network-station market. It gives the network complete control over its policies. This 'bottling-up' of the best facilities has undoubtedly had a discouraging effect upon the creation and growth of new networks. Furthermore, common ownership of network and station places the network in a position where its interest as the owner of certain stations may conflict with its interest as a network organization serving affiliated stations. In dealings with advertisers, the network represents its own stations in a proprietary capacity and the affiliated stations in something akin to an agency capacity. The danger is present that the network organization will give preference to its own stations at the expense of its affiliates." (Report, p. 67.)

The Commission stated that if the question had arisen as an original matter, it might well have concluded that the public interest required severance of the business of station ownership from that of network operation. But since substantial business interests have been formed on the basis of the Commission's continued tolerance of the situation, it was found inadvisable to take such a drastic step. The Commission concluded, however, that "the licensing of two stations in the same area to a single network organization is basically unsound and contrary to the public interest", and that it was also against the "public interest" for network organizations to own stations in areas where the available facilities were so few or of such unequal coverage that competition would thereby be substantially restricted. Recognizing that these considerations called for flexibility in their application to particular situations, the Commission provided that "networks will be given full opportunity, on proper application for new facilities or renewal of existing licenses, to call to our attention any reasons why

the principle should be modified or held inapplicable." (Report, p. 68.) Regulation 3.106 reads as follows: "No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

Regulation 3.107—Dual network operation. This regulation provides that: "No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network." In its Supplemental Report of October 11, 1941, the Commission announced the indefinite suspension of this regulation. There is no occasion here to consider the validity of Regulation 3.107, since there is no immediate threat of its enforcement by the Commission.

Regulation 3.108—Control by networks of station rates. The Commission found that NBC's affiliation contracts contained a provision empowering the network to reduce the station's network rate, and thereby to reduce the compensation received by the station, if the station set a lower rate for non-network national advertising than the rate established by the contract for the network programs. Under this provision the station could not sell time to a national advertiser for less than it would cost the advertiser if he bought the time from NBC. In the words of NBC's vice-president, "This means simply that a national advertiser should pay the same price for the station whether he buys it through one source or another source. It means that we do not believe that our stations should go into competition with ourselves." (Report, p. 73.)

The Commission concluded that "it is against the public interest for a station licensee to enter into a contract with a network which has the effect of decreasing its ability to compete for national business. We believe that the public interest will best be served and listeners supplied with the best programs if stations bargain freely

with national advertisers." (Report, p. 75.) Accordingly, the Commission adopted Regulation 3.108, which provides as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs."

The appellants attack the validity of these Regulations along many fronts. They contend that the Commission went beyond the regulatory powers conferred upon it by the Communications Act of 1934; that even if the Commission were authorized by the Act to deal with the matters comprehended by the Regulations, its action is nevertheless invalid because the Commission misconceived the scope of the Act, particularly § 313 which deals with the application of the anti-trust laws to the radio industry; that the Regulations are arbitrary and capricious; that if the Communications Act of 1934 were construed to authorize the promulgation of the Regulations, it would be an unconstitutional delegation of legislative power; and that, in any event, the Regulations abridge the appellants' right of free speech in violation of the First Amendment. We are thus called upon to determine whether Congress has authorized the Commission to exercise the power asserted by the Chain Broadcasting Regulations, and if it has, whether the Constitution forbids the exercise of such authority.

Federal regulation of radio[3] begins with the Wireless Ship Act of June 24, 1910, 36 Stat. 629, which forbade any steamer carrying or licensed to carry fifty or more persons to leave any American port unless equipped with efficient apparatus for radio communication, in charge of a skilled operator. The enforcement of this legislation was entrusted to the Secretary of Commerce and Labor, who was in charge of the administration of the marine navigation laws. But it was not until 1912, when the United

[3] The history of federal regulation of radio communication is summarized in Herring and Gross, Telecommunications (1936) 239-86; Administrative Procedure in Government Agencies, Monograph of the Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 186, 76th Cong., 3d Sess., Part 3, dealing with the Federal Communications Commission, pp. 82-84; 1 Socolow, Law of Radio Broadcasting (1939) 38-61; Donovan, Origin and Development of Radio Law (1930).

States ratified the first international radio treaty, 37 Stat. 1565, that the need for general regulation of radio communication became urgent. In order to fulfill our obligations under the treaty, Congress enacted the Radio Act of August 13, 1912, 37 Stat. 302. This statute forbade the operation of radio apparatus without a license from the Secretary of Commerce and Labor; it also allocated certain frequencies for the use of the Government, and imposed restrictions upon the character of wave emissions, the transmission of distress signals, and the like.

The enforcement of the Radio Act of 1912 presented no serious problems prior to the World War. Questions of interference arose only rarely because there were more than enough frequencies for all the stations then in existence. The war accelerated the development of the art, however, and in 1921 the first standard broadcast stations were established. They grew rapidly in number, and by 1923 there were several hundred such stations throughout the country. The Act of 1912 had not set aside any particular frequencies for the use of private broadcast stations; consequently, the Secretary of Commerce selected two frequencies, 750 and 833 kilocycles, and licensed all stations to operate upon one or the other of these channels. The number of stations increased so rapidly, however, and the situation became so chaotic, that the Secretary, upon the recommendation of the National Radio Conferences which met in Washington in 1923 and 1924, established a policy of assigning specified frequencies to particular stations. The entire radio spectrum was divided into numerous bands, each allocated to a particular kind of service. The frequencies ranging from 550 to 1500 kilocycles (96 channels in all, since the channels were separated from each other by 10 kilocycles) were assigned to the standard broadcast stations. But the problems created by the enormously rapid development of radio were far from solved. The increase in the number of channels was not enough to take care of the constantly growing number of stations. Since there were more stations than available frequencies, the Secretary of Commerce attempted to find room for everybody by limiting the power and hours of operation of stations in order that several stations might use the same channel. The number of stations multiplied so rapidly, however, that by November, 1925, there were almost 600 stations in the country, and there were 175 applications for new stations. Every channel in the standard broadcast band was, by that time, already occupied by at least one station, and

many by several. The new stations could be accommodated only by extending the standard broadcast band, at the expense of the other types of services, or by imposing still greater limitations upon time and power. The National Radio Conference which met in November, 1925, opposed both of these methods and called upon Congress to remedy the situation through legislation.

The Secretary of Commerce was powerless to deal with the situation. It had been held that he could not deny a license to an otherwise legally qualified applicant on the ground that the proposed station would interfere with existing private or Government stations. *Hoover* v. *Intercity Radio Co.*, 286 Fed. 1003. And on April 16, 1926, an Illinois district court held that the Secretary had no power to impose restrictions as to frequency, power, and hours of operation, and that a station's use of a frequency not assigned to it was not a violation of the Radio Act of 1912. *United States* v. *Zenith Radio Corp.*, 12 F. 2d 614. This was followed on July 8, 1926, by an opinion of Acting Attorney General Donovan that the Secretary of Commerce had no power, under the Radio Act of 1912, to regulate the power, frequency or hours of operation of stations. 35 Ops. Atty. Gen. 126. The next day the Secretary of Commerce issued a statement abandoning all his efforts to regulate radio and urging that the stations undertake self-regulation.

But the plea of the Secretary went unheeded. From July, 1926, to February 23, 1927, when Congress enacted the Radio Act of 1927, 44 Stat. 1162, almost 200 new stations went on the air. These new stations used any frequencies they desired, regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air, nobody could be heard. The situation became so intolerable that the President in his message of December 7, 1926, appealed to Congress to enact a comprehensive radio law:

> "Due to the decisions of the courts, the authority of the department [of Commerce] under the law of 1912 has broken down; many more stations have been operating than can be accommodated within the limited number of wave lengths available; further stations are in course of construction; many stations have departed from the scheme of allocations set down by the department, and the whole service of this most important public function has drifted into such chaos as

seems likely, if not remedied, to destroy its great value. I most urgently recommend that this legislation should be speedily enacted." (H. Doc. 483, 69th Cong., 2d Sess., p. 10.)

The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another.[4] Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile. In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communication, Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential.

The Radio Act of 1927 created the Federal Radio Commission, composed of five members, and endowed the Commission with wide licensing and regulatory powers. We do not pause here to enumerate the scope of the Radio Act of 1927 and of the authority entrusted to the Radio Commission, for the basic provisions of that Act are incorporated in the Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 151 *et seq.*, the legislation immediately before us. As we noted in *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, "In its essentials the Communications Act of 1934 [so far as its provisions relating to radio are concerned] derives from the Federal Radio Act of 1927. . . . By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927."

Section 1 of the Communications Act states its "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and

[4] See Morecroft, Principles of Radio Communication (3d ed. 1933) 355-402; Terman, Radio Engineering (2d ed. 1937) 593-645.

world-wide wire and radio communication service with adequate facilities at reasonable charges". Section 301 particularizes this general purpose with respect to radio: "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." To that end a Commission composed of seven members was created, with broad licensing and regulatory powers.

Section 303 provides:

> "Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> (a) Classify radio stations;
>
> (b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;
>
> . . . . . .
>
> (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act . . .;
>
> (g) Study new uses for radio, provid for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;
>
> . . . . . .
>
> (i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;
>
> . . . . . .
>
> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. . . ."

The criterion governing the exercise of the Commission's licensing power is the "public interest, convenience, or necessity". §§ 307(a)(d), 309(a), 310, 312. In addition, § 307(b) directs the Commission that "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity", a criterion which "is as concrete as the complicated factors for judgment in such a field of delegated authority permit". *Federal Communications Comm'n.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138. "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services . . . ." *Radio Comm'n.* v. *Nelson Bros. Co.*, 289 U. S. 266, 285.

The "public interest" to be served under the Communications Act is thus the interest of the listening public in "the larger and more effective use of radio". § 303(g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *Federal Communications Comm'n.* v. *Sanders Radio Station*, 309 U. S. 470, 475. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the applica-

tion of the standard of "public interest, convenience, or necessity". *See Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 n. 2.

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303(g) provides that the Commission shall "generally encourage the larger and more effective use of radio in the public interest"; subsection (i) gives the Commission specific "authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and subsection (r) empowers it to adopt "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act".

These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest". We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses.

In essence, the Chain Broadcasting Regulations represent a particularization of the Commission's conception of the "public interest" sought to be safeguarded by Congress in enacting the

Communications Act of 1934. The basic consideration of policy underlying the Regulations is succinctly stated in its Report: "With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. . . . The net effect [of the practices disclosed by the investigation] has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging 'the larger and more effective use of radio in the public interest' if we were to grant licenses to persons who persist in these practices." (Report, pp. 81, 82.)

We would be asserting our personal views regarding the effective utilization of radio were we to deny that the Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations. True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *Federal Communications Comm'n.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137. In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers. It was given a comprehensive mandate to "encourage the larger and more effective use of radio in the public interest", if need be, by making "special regulations applicable to radio stations engaged in chain broadcasting". §303(g)(i).

Generalities unrelated to the living problems of radio communication of course cannot justify exercises of power by the Commission. Equally so, generalities empty of all concrete considerations of the actual bearing of regulations promulgated by the Commission to the subject-matter entrusted to it, cannot strike down exercises of power by the Commission. While Con-

gress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

For the cramping construction of the Act pressed upon us, support cannot be found in its legislative history. The principal argument is that § 303(i), empowering the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting", intended to restrict the scope of the Commission's powers to the technical and engineering aspects of chain broadcasting. This provision comes from § 4(h) of the Radio Act of 1927. It was introduced into the legislation as a Senate committee amendment to the House bill (H. R. 9971, 69th Cong., 1st Sess.) This amendment originally read as follows:

> "(C) The commission, from time to time, as public convenience, interest, or necessity requires, shall—
>
> . . . . . .
>
> (j) When stations are connected by wire for chain broadcasting, determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting."

The report of the Senate Committee on Interstate Commerce, which submitted this amendment, stated that under the bill the Commission was given "complete authority . . . to control chain broadcasting." Sen. Rep. No. 772, 69th Cong., 1st Sess., p. 3. The bill as thus amended was passed by the Senate, and then sent to conference. The bill that emerged from the conference

committee, and which became the Radio Act of 1927, phrased the amendment in the general terms now contained in § 303(i) of the 1934 Act: the Commission was authorized "to make special regulations applicable to radio stations engaged in chain broadcasting". The conference reports do not give any explanation of this particular change in phrasing, but they do state that the jurisdiction conferred upon the Commission by the conference bill was substantially identical with that conferred by the bill passed by the Senate. See Sen. Doc. No. 200, 69th Cong., 2d Sess., p. 17; H. Rep. 1886, 69th Cong., 2d Sess., p. 17. We agree with the District Court that in view of this legislative history, § 303(i) cannot be construed as no broader than the first clause of the Senate amendment, which limited the Commission's authority to the technical and engineering phases of chain broadcasting. There is no basis for assuming that the conference intended to preserve the first clause, which was of limited scope, and abandon the second clause, which was of general scope, by agreeing upon a provision which was broader and more comprehensive than those it supplanted.[5]

A totally different source of attack upon the Regulations is found in § 311 of the Act, which authorizes the Commission to withhold licenses from persons convicted of having violated the anti-trust laws. Two contentions are made—first, that this provision puts considerations relating to competition outside the Commission's concern before an applicant has been convicted

[5] In the course of the Senate debates on the conference report upon the bill that became the Radio Act of 1927, Senator Dill, who was in charge of the bill, said: "While the commission would have the power under the general terms of the bill, the bill specifically sets out as one of the special powers of the commission the right to make specific regulations for governing chain broadcasting. As to creating a monopoly of radio in this country, let me say that this bill absolutely protects the public, so far as it can protect them, by giving the commission full power to refuse a license to anyone who it believes will not serve the public interest, convenience, or necessity. It specifically provides that any corporation guilty of monopoly shall not only not receive a license but that its license may be revoked; and if after a corporation has received its license for a period of three years it is then discovered and found to be guilty of monopoly, its license will be revoked. . . . In addition to that, the bill contains a provision that no license may be transferred from one owner to another without the written consent of the commission, and the commission, of course, having the power to protect against a monopoly, must give such protection. I wish to state further that the only way by which monopolies in the radio business can secure control of radio here, even for a limited period of time, will be by the commission becoming servile to them. Power must be lodged somewhere, and I myself am unwilling to assume in advance that the commission proposed to be created will be servile to the desires and demands of great corporations of this country." 68 Cong. Rec. 2881.

of monopoly or other restraints of trade, and second, that in any event, the Commission misconceived the scope of its powers under § 311 in issuing the Regulations. Both of these contentions are unfounded. Section 311 derives from § 13 of the Radio Act of 1927, which expressly commanded, rather than merely authorized, the Commission to refuse a license to any person judicially found guilty of having violated the anti-trust laws. The change in the 1934 Act was made, in the words of Senator Dill, the manager of the legislation in the Senate, because "it seemed fair to the committee to do that". 78 Cong. Rec. 8825. The Commission was thus permitted to exercise its judgment as to whether violation of the anti-trust laws disqualified an applicant from operating a station in the "public interest". We agree with the District Court that "The necessary implication from this [amendment in 1934] was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee." 47 F. Supp. 940, 944.

That the Commission may refuse to grant a license to persons adjudged guilty in a court of law of conduct in violation of the anti-trust laws certainly does not render irrelevant consideration by the Commission of the effect of such conduct upon the "public interest, convenience, or necessity". A licensee charged with practices in contravention of this standard cannot continue to hold his license merely because his conduct is also in violation of the anti-trust laws and he has not yet been proceeded against and convicted. By clarifying in § 311 the scope of the Commission's authority in dealing with persons convicted of violating the anti-trust laws, Congress can hardly be deemed to have limited the concept of "public interest" so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce. Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the "public interest", merely because its misconduct happened to be an unconvicted violation of the anti-trust laws.

Alternatively, it is urged that the Regulations constitute an *ultra vires* attempt by the Commission to enforce the anti-trust laws, and that the enforcement of the anti-trust laws is the province not of the Commission but of the Attorney General and

the courts. This contention misconceives the basis of the Commission's action. The Commission's Report indicates plainly enough that the Commission was not attempting to administer the antitrust laws:

"The prohibitions of the Sherman Act apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. . . . While many of the network practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals. . . . We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest." (Report, pp. 46, 83, 83n. 3.)

We conclude, therefore, that the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting. There remains for consideration the claim that the Commission's exercise of such authority was unlawful.

The Regulations are assailed as "arbitrary and capricious". If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in *Board of Trade* v. *United States*, 314 U. S. 534, 548, is relevant here: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.

It would be sheer dogmatism to say that the Commission made out no case for its allowable discretion in formulating these Regulations. Its long investigation disclosed the existences of practices which it regarded as contrary to the "public interest". The Commission knew that the wisdom of any action it took would have to be tested by experience: "We are under no illusion that the regulations we are adopting will solve all questions of public interest with respect to the network system of program distribution. . . . The problems in the network field are interdependent, and the steps now taken may perhaps operate as a partial solution of problems not directly dealt with at this time. Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial." (Report, p. 88.) The problems with which the Commission attempted to deal could not be solved at once and for all time by rigid rules-of-thumb. The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience, or necessity." If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

Since there is no basis for any claim that the Commission ~~did not fail~~ failed to observe procedural safeguards required by law, we reach the contention that the Regulations should be denied enforcement on constitutional grounds. Here, as in *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 24-25, the claim is made that the standard of "public interest" governing the exercise of the powers delegated to the Commission by Congress is so vague and indefinite that, if it be construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional. But, as we held in that case, "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary." *Ibid.* See *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 285; *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137-38. Compare *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428; *Intermountain Rate Cases*, 234 U. S. 476, 486-89; *United States* v. *Lowden*, 308 U. S. 225.

We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity". Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

A procedural point calls for just a word. The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial *de novo* of the matters heard by the Commission and dealt with in its Report would have been improper. See *Tagg Bros.* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426.

Affirmed.

Mr. Justice BLACK and Mr. Justice RUTLEDGE took no part in the consideration or decision of these cases.

——— Mr. Justice MURPHY, dissenting.

I do not question the objectives of the proposed regulations, and it is not my desire by narrow statutory interpretation to weaken the authority of government agencies to deal efficiently with matters committed to their jurisdiction by the Congress. Statutes of this kind should be construed so that the agency concerned may be able to cope effectively with problems which the Congress intended to correct, or may otherwise perform the functions given to it. But we exceed our competence when we gratuitously bestow upon an agency power which the Congress has not granted. Since that is what the Court in substance does today, I dissent.

In the present case we are dealing with a subject of extreme importance in the life of the nation. Although radio broadcasting, like the press, is generally conducted on a commercial basis, it is not an ordinary business activity, like the selling of securities or the marketing of electrical power. In the dissemination of information and opinion radio has assumed a position of commanding importance, rivalling the press and the pulpit. Owing to its physical characteristics radio, unlike the other methods of conveying information, must be regulated and rationed by the government. Otherwise there would be chaos, and radio's usefulness would be largely destroyed. But because of its vast potentialities as a medium of communication, discussion and propaganda, the character and extent of control that should be exercised over it by the government is a matter of deep and vital concern. Events in Europe show that radio may readily be a weapon of authority and misrepresentation, instead of a means of entertainment and enlightenment. It may even be an instrument of oppression. In pointing out these possibilities I do not mean to intimate in the slightest that they are imminent or probable in this country, but they do suggest that the construction of the instant statute should be approached with more than ordinary restraint and caution, to avoid an interpretation that is not clearly justified by the conditions that brought about its enactment, or that would give the Commission greater powers than the Congress intended to confer.

The Communications Act of 1934 does not in terms give the Commission power to regulate the contractual relations between the stations and the networks. *Columbia System* v. *United States*, 316 U. S. 407, 416. It is only as an incident of the power to grant or withhold licenses to individual stations under §§ 307,

308, 309 and 310 that this authority is claimed,[1] except as it may have been provided by subdivisions (g), (i) and (r) of § 303, and by §§ 311 and 313. But nowhere in these sections, taken singly or collectively, is there to be found by reasonable construction or necessary inference, authority to regulate the broadcasting industry as such, or to control the complex operations of the national networks.

In providing for regulation of the radio the Congress was under the necessity of vesting a considerable amount of discretionary authority in the Commission. The task of choosing between various claimants for the privilege of using the air waves is essentially an administrative one. Nevertheless, in specifying with some degree of particularity the kind of information to be included in an application for a license, the Congress has indicated what general conditions and considerations are to govern the granting and withholding of station licenses. Thus an applicant is required by § 308(b) to submit information bearing upon his citizenship, character, and technical, financial and other qualifications to operate the proposed station, as well as data relating to the ownership and location of the proposed station, the power and frequencies desired, operating periods, intended use, and such other information as the Commission may require. Licenses, frequencies, hours of operation and power are to be fairly distributed among the several States and communities to provide efficient service to each. § 307(b). Explicit provision is made for dealing with applicants and licensees who are found guilty, or who are under the control of persons found guilty of violating the federal anti-trust laws. §§ 311 and 313. Subject to the limitations defined in the Act, the Commission is required to grant a station license to any applicant "if public convenience, interest or necessity will be served thereby". § 307(a). Nothing is said, in any of these sections, about network contracts, affiliations, or business arrangements.

The power to control network contracts and affiliations by means of the Commission's licensing powers cannot be derived from implication out of the standard of "public convenience,

[1] The regulations as first proposed were not connected with denial of applications for initial or renewal station licenses but provided instead that: "No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization", which contained any of the disapproved provisions. After a short time, however, the regulations were cast in their present form, making station licensing depend upon conformity with the regulations.

interest or necessity". We have held that: "the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel." *Commission* v. *Sanders Radio Station*, 309 U. S. 470, 475. The criterion of "public convenience, interest or necessity" is not an indefinite standard, but one to be "interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services", . . . *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 285. Nothing in the context of which the standard is a part refers to network contracts. It is evident from the record that the Comission is making its determination of whether the public interest would be served by renewal of an existing license or licenses, not upon an examination of written applications presented to it, as required by §§ 308 and 309, but upon an investigation of the broadcasting industry as a whole, and general findings made in pursuance thereof which relate to the business methods of the network companies rather than the characteristics of the individual stations and the peculiar needs of the areas served by them. If it had been the intention of the Congress to invest the Commission with the responsibility, through its licensing authority, of exercising far-reaching control —as exemplified by the proposed regulations—over the business operations of chain broadcasting and radio networks as they were then or are now organized and established, it is not likely that the Congress would have left it to mere inference or implication from the test of "public convenience, interest or necessity", or that Congress would have neglected to include it among the considerations expressly made relevant to license applications by § 308(b). The subject is one of such scope and importance as to warrant explicit mention. To construe the licensing sections (§§ 307, 308, 309, 310) as granting authority to require fundamental and revolutionary changes in the business methods of the broadcasting networks—methods which have been in existence for several years and which have not been adjudged unlawful—would inflate and distort their true meaning and extend

them beyond the limited purposes which they were intended to serve.

It is quite possible, of course, that maximum utilization of the radio as an instrument of culture, entertainment, and the diffusion of ideas is inhibited by existing network arrangements. Some of the conditions imposed by the broadcasting chains are possibly not conducive to a freer use of radio facilities, however essential they may be to the maintenance of sustaining programs and the operation of the chain broadcasting business as it is now conducted. But I am unable to agree that it is within the present authority of the Commission to prescribe the remedy for such conditions. It is evident that a correction of these conditions in the manner proposed by the regulations will involve drastic changes in the business of radio broadcasting which the Congress has not clearly and and definitely empowered the Commission to undertake.

If this were a case in which a station license had been withheld from an individual applicant or licensee because of special relations or commitments that would seriously compromise or limit his ability to provide adequate service to the listening public, I should be less inclined to make any objection. As an incident of its authority to determine the eligibility of an individual applicant in an isolated case, the Commission might possibly consider such factors. In the present case, however, the Commission has reversed the order of things. Its real objective is to regulate the business practices of the major networks, thus bringing within the range of its regulatory power the chain broadcasting industry as a whole. By means of these regulations and the enforcement program, the Commission would not only extend its authority over business activities which represent interests and investments of a very substantial character, which have not been put under its jurisdiction by the Act, but would greatly enlarge its control over an institution that has now become a rival of the press and pulpit as a purveyor of news and entertainment and a medium of public discussion. To assume a function and responsibility of such wide reach and importance in the life of the nation, as a mere incident of its duty to pass on individual applications for permission to operate a radio station and use a specific wave length, is an assumption of authority to which I am not willing to lend my assent.

Again I do not question the need of regulation in this field, or the authority of the Congress to enact legislation that would vest in the Commission such power as it requires to deal with the problem, which it has defined and analyzed in its report with admirable lucidity. It is possible that the remedy indicated by the proposed regulations is the appropriate one, whatever its effect may be on the sustaining programs, advertising contracts, and other characteristics of chain broadcasting as it is now conducted in this country. I do not believe, however, that the Commission was justified in claiming the responsibility and authority it has assumed to exercise without a clear mandate from the Congress.

An examination of the history of this legislation convinces me that the Congress did not intend by anything in § 303, or any other provision of the Act to confer on the Commission the authority it has assumed to exercise by the issuance of these regulations. Section 303 is concerned primarily with technical matters, and the subjects of regulation authorized by most of its subdivisions are exceedingly specific—so specific in fact that it is reasonable to infer that, if Congress had intended to cover the subject of network contracts and affiliations, it would not have left it to dubious implications from general clauses, lifted out of context, in subdivisions (g), (i) and (r). I am unable to agree that in authorizing the Commission in § 303(g) to study new uses for radio, provide for experimental use of frequencies, and "generally encourage the larger and more effective use of radio in the public interest", it was the intention or the purpose of the Congress to confer on the Commission the regulatory powers now being asserted. Manifestly that subdivision dealt with experimental and development work—technical and scientific matters, and the construction of its concluding clause should be accordingly limited to those considerations. Nothing in its legislative history suggests that it had any broader purpose.

It was clearly not the intention of the Congress by the enactment of § 303(i), authorizing the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting", to invest the Commission with the authority now claimed over network contracts. This section is a verbatim reenactment of § 4(h) of the Radio Act of 1927, and had its origin in a Senate amendment to the bill which became that Act. In its original form it provided that the Commission, from time to

time, as public convenience, interest, or necessity required, should:

"When stations are connected by wire for chain broadcasting, [the Commission should] determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting."

It was evidently the purpose of this provision to remedy a situation that was described as follows by Senator Dill (who was in charge of the bill in the Senate) in questioning a witness at the hearings of the Senate Committee on Interstate Commerce:

". . . During the past few months there has grown up a system of chain broadcasting, extending over the United States a great deal of the time. I say a great deal of the time—many nights a month—and the stations that are connected are of such widely varying meter lengths that the ordinary radio set that reaches out any distance is unable to get anything but that one program, and so, in effect, that one program monopolizes the air. I realize it is somewhat of a technical engineering problem, but it has seemed to many people, at least many who have written to me, that when stations are carrying on chain programs that they might be limited to the use of wave lengths adjoining or near enough to one another that they would not cover the entire dial. I do not know whether legislation ought to restrict that or whether it had better be done by regulations of the department. I want to get your opinion as to the advisability in some way protecting people who want to hear some other program than the one being broadcasted by chain broadcast." (Report of Hearings Before Senate Committee on Interstate Commerce on S. 1 and S. 1754, 69th Cong., 1st Sess. (1926) p. 123.

In other words, when the same program was simultaneously broadcast by chain stations, the weaker independent stations were drowned out because of the high power of the chain stations. With the receiving sets then commonly in use, listeners were unable to get any program except the chain program. It was essentially an interference problem. In addition to determining power and wave length for chain stations, it would have been the duty of the Commission, under the amendment, to make other regulations necessary for "equitable radio service to the listeners in the communities or areas affected by chain broadcasting." The last clause should not be interpreted out of context and without relation to the problem at which the amendment was aimed. It is reasonably construed as simply authorizing the Commission to remedy other technical problems of interference involved in

chain broadcasting in addition to power and wave length by requiring special types of equipment, controlling locations, etc. The statement in the Senate Committee Report that this provision gave the Commission "complete authority . . . to control chain broadcasting" (S. Rep. No. 772, 69th Cong., 1st Sess., p. 3) must be taken as meaning that the provision gave complete authority with respect to the specific problem which the Senate intended to meet, a problem of technical interference.

While the form of the amendment was simplified in the Conference Committee so as to authorize the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting", both Houses were assured in the report of the Conference Committee that "the jurisdiction conferred in this paragraph is substantially the same as the jurisdiction conferred upon the Commission by . . . the Senate amendment." (Sen. Doc. No. 200, 69th Cong., 2d Sess., p. 17; H. Rep. No. 1886, 69th Cong., 2d Sess., p. 17). This is further borne out by a statement of Senator Dill in discussing the conference report on the Senate floor:

> "What is happening to-day is that the National Broadcasting Co., which is a part of the great Radio Trust, to say the least, if not a monopoly, is hooking up stations in every community on their various wave lengths with high powered stations and sending one program out, and they are forcing the little stations off the board so that the people cannot hear anything except the one program.
>
> "There is no power to-day in the hands of the Department of Commerce to stop that practice. The radio commission will have the power to regulate and prevent it and give the independents a chance." (68 Cong. Rec. 3031.)

Section 303(r) is certainly no basis for inferring that the Commission is empowered to issue the challenged regulations. This subdivision is not an independent grant of power, but only an authorization to: "Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." There is no provision in the Act for the control of network contractual arrangements by the Commission, and consequently § 303(r) is of no consequence here.

To the extent that existing network practices may have run counter to the anti-trust laws, the Congress has expressly provided the means of dealing with the problem. The enforcement

of those laws has been committed to the courts and other law enforcement agencies. In addition to the usual penalties prescribed by statute for their violation, however, the Commission has been expressly authorized by §311 to refuse a station license to any person "finally adjudged guilty by a Federal court" of attempting unlawfully to monopolize radio communication. Anyone under the control of such a person may also be refused a license. And whenever a court has ordered the revocation of an existing license, as expressly provided in § 313, a new license may not be granted by the Commission to the guilty party or to any person under his control. In my opinion these provisions (§§ 311 and 313) clearly do not and were not intended to confer independent authority on the Commission to supervise network contracts or to enforce competition between radio networks by withholding licenses from stations, and do not justify the Commission in refusing a license to an applicant otherwise qualified, because of business arrangements that may constitute an unlawful restraint of trade, when the applicant has not been finally adjudged guilty of violating the anti-trust laws, and is not controlled by one so adjudged.

The conditions disclosed by the Commission's investigation, if they require correction, should be met, not by the invention of authority where none is available or by diverting existing powers out of their true channels and using them for purposes to which they were not addressed, but by invoking the aid of the Congress or the service of agencies that have been entrusted with the enforcement of the anti-trust laws. In other fields of regulation the Congress has made clear its intentions. It has not left to mere inference and guess-work the existence of authority to order broad changes and reforms in the national economy or the structure of business arrangements in the Public Utility Holding Company Act, 49 Stat. 803, the Securities Act of 1933, 48 Stat. 74, the Federal Power Act, 49 Stat. 838, and other measures of similar character. Indeed the Communications Act itself contains cogent internal evidence that Congress did not intend to grant power over network contractual arrangements to the Commission. In § 215(c) of Title II, dealing with common carriers by wire and radio, Congress provided:

"The Commission shall examine all contracts of common carriers subject to this Act which prevent the other party thereto from dealing with another common carrier subject to this Act,

and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable."

Congress had no difficulty here in expressing the possible desirability of regulating a type of contract roughly similar to the ones with which we are now concerned, and in reserving to itself the ultimate decision upon the matters of policy involved. Insofar as the Congress deemed it necessary in this legislation to safeguard radio broadcasting against arrangements that are offensive to the anti-trust laws or monopolistic in nature, it made specific provision in §§ 311 and 313. If the existing network contracts are deemed objectionable because of monopolistic or other features, and no remedy is presently available under these provisions, the proper course is to seek amendatory legislation from the Congress, not to fabricate authority by ingenious reasoning based upon provisions that have no true relation to the specific problem.

Mr. Justice ROBERTS agrees with these views.

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 555

COLUMBIA BROADCASTING SYSTEM, INC.,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED NOVEMBER 30, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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COLUMBIA BROADCASTING SYSTEM, INC.,
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IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action, File No. 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant

SUMMONS

To the above-mentioned Defendant:

You are hereby summoned and required to serve upon John J. Burns, plaintiff's attorney, whose address is 40 Wall Street, New York, New York, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

George J. H. Follmer, Clerk of Court. (Seal of the U. S. District Court.)

Date Oct. 30th, 1941.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action, File No. 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant

COMPLAINT

This is an action to set aside, annul and permanently enjoin the enforcement of certain portions of an order of

the Federal Communications Commission (hereinafter re-
[fol. 2] ferred to as "the Commission") denominated "Commission Order in Docket No. 5060 in the Matter of the Investigation of Chain Broadcasting", promulgated on May 2, 1941 and amended on October 11, 1941. Jurisdiction of this action is invoked under the provisions of Section 402(a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C. § 402(a)) as amended, and of the Urgent Deficiencies Appropriation Act (38 Stat. 219, 220; 28 U. S. C. §§ 41(28), 43-48 (1913), inclusive) as amended.

For a cause of action against the defendant, the plaintiff alleges upon information and belief:

First: The plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New York, and has its principal office and place of business in the City, County and State of New York, and within the Southern District of New York.

Second: The Federal Communications Commission is a Commission created by the Communications Act of 1934, and is charged with executing and enforcing the provisions of that law.

Third: The plaintiff is engaged primarily in the business of operating a nation-wide network broadcasting system. The plaintiff and its predecessor company have been engaged in this business since 1927. There are issued and outstanding 1,716,277 shares of the capital stock of plaintiff of the par value of $2.50 each, listed and traded on the New York Stock Exchange, and owned by more than 8,000 stockholders. It has total assets of over $22,000,000, over $18,000,000 of which is devoted directly to network broadcasting. The plaintiff supplies network programs to 123 stations in 122 cities of the country, which programs can be heard by over 90% of the listening audience of the nation. At December 28, 1940 it employed over 1,800 persons regularly, excluding performing artists and musicians. It has entered into long-term contracts and commitments for the use of land and buildings, for the furnishing of news and special program features, and for the employment of musicians, for several years in the future, requiring payments to be made by the plaintiff in excess of $4,000,000. Its earnings from the operation of its network exceeded $3,000,000 in both 1939 and 1940.

[fol. 3] Network broadcasting is an integral and necessary part of the American system of radio broadcasting, and its existence is essential to the fullest and most effective utilization of the radio facilities of the country. Many improvements in engineering, program quality and the general public service rendered by radio are due to the network system of broadcasting. It has been responsible largely for the growth of radio as a medium of public information, education, entertainment, and advertising.

Fourth: The operation of its network by the plaintiff consists essentially of the furnishing of radio programs for simultaneous broadcasting thereof by radio stations to which these programs are transmitted from a central point of origination by means of service over wire telephone lines, contracted for and used by the plaintiff for this purpose. The plaintiff furnishes the stations commercial and sustaining programs. The commercial programs are those sponsored by an advertiser who pays for their broadcasting; the sustaining programs are not paid for by any advertiser, but are furnished by the network. The stations operate solely by virtue of licenses to operate issued by the Commission. Plaintiff furnishes these network programs to 115 such stations pursuant to contracts with such stations. These contracts are known in the broadcast industry as affiliation or outlet contracts, and the stations are known as network affiliates or outlets.

Fifth: Plaintiff's affiliation contracts are, in most cases, in the form shown in Exhibit "A", annexed. The material provisions are substantially as follows:

1. Plaintiff agrees to furnish to the station an average of at least 60 hours per week of network sustaining and sponsored programs.

2. Plaintiff will furnish all available network sustaining programs without charge. It will furnish to the station all commercial programs which the sponsor requests the station to broadcast. In turn, the station will be paid a specified hourly rate for the use of its facilities in broadcasting network commercial programs. Usually this hourly rate paid to the station is graduated upward as specified totals of network commercial hours are successively attained by the station.

[fol. 4] 3. The station will not broadcast programs from any other network, except special events of public importance, from occasional local, state, or regional hook-ups.

4. Plaintiff will not furnish its programs to any other standard broadcast station in the city in which the station is located, except in case of public emergency.

5. The station will, upon not less than 28 days' notice from plaintiff, broadcast the sponsored or commercial programs furnished to it by plaintiff, provided that:

(a) The station need not broadcast such programs for more than 50 "converted hours" (on the average this requires 79 regular clock hours) in any one week,

(b) The station may substitute its own sustaining programs devoted to education, public service, or events of public interest, and

(c) The station may reject any network sponsored program which it deems not in the public interest.

6. The station is free to, but is not required to broadcast the network sustaining programs.

7. The contracts are usually for a term of 5 years with the plaintiff having the right, in some instances, to terminate on 12 months' notice.

Sixth: These contracts constitute a relationship between the plaintiff and the affiliated stations which is and has been valuable and advantageous to both. The provisions of the contracts alleged in Paragraph Fifth are indispensable to the efficient operation of the plaintiff's business. They are necessary and essential for the creation and maintenance of the plaintiff's identity as a network and of its public goodwill. They are necessary to enable plaintiff to compete with printed media such as magazines and other publications of national circulation, outdoor advertising and the like. Agreements of this character between networks and outlet stations are indispensable to the existence of a strong and efficient system of network broadcasting. They assure a better, fuller and more effective use of the radio facilities of the nation than any system of network broadcasting without them.

[fol. 5] Seventh: On May 2, 1941 the Commission issued a report, and the order which, as amended, is complained of

in this action. The original order was designated "Commission Order in Docket No. 5060 In the Matter of the Investigation of Chain Broadcasting, May 2, 1941". The amendment to the said order of May 2, 1941 was made by an order which the Commission issued on October 11, 1941. On the latter date the Commission also issued a supplemental report, denominated herein its "Opinion On Rehearing." A copy of the order of May 2, 1941 is hereto annexed and marked Exhibit "B". A copy of the Opinion on Rehearing, the Dissenting Opinion On Rehearing, and the order issued October 11, 1941, is hereto annexed and marked Exhibit "C".

The order of May 2, 1941, as amended by the order of October 11, 1941, promulgated certain Rules, among them the following:

"3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization[1] under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.

"Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

"Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or [fol. 6] understanding express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the

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[1] The term "network organization", as used herein, includes national and regional network organizations.

station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

"Section 3.104. No license shall be granted to a standard broadcast station which options [1] for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours [2] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.[3] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or under- [fol. 7] standing, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the

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[1] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

[2] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

[3] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance."

On July 22, 1941 the Commission deferred the effective date of the order of May 2, 1941, with respect to existing contracts, arrangements or understandings, until September 16, 1941. On August 28, 1941 the Commission further postponed the said effective date to a time to be fixed by the Commission. By its order of October 11, 1941 the Commission fixed the said effective date at November 15, 1941:

"It is Further Ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

The purposes, terms and effect of these Rules are to prohibit station licensees from having agreements of the kind and character alleged in Paragraph Fifth, which are essential to the efficient operation of the system of network broadcasting.

Eighth: The report and order originated in an investigation instituted by the Commission on its own motion into network or chain broadcasting. The Commission authorized the investigation on March 18, 1938 by Order [fol. 8] No. 37, hereto annexed and marked Exhibit "D". On April 6, 1938 a Committee of three Commissioners was appointed by the Commission to supervise the investigation,

to hold hearings in connection therewith, and to make reports to the Commission with recommendations for action by the Commission.

The plaintiff was made a respondent and party to the proceedings in this investigation and together with other respondents was directed to produce evidence on the subject of network broadcasting by a letter of the Commission dated September 20, 1938 annexed hereto and marked Exhibit "E".

Between November 14, 1938 and May 19, 1939 the Committee held legislative hearings pursuant to public notice. On June 12, 1940 the Committee submitted its report to the Commission. In November, 1940, upon invitation of the Commission given at the request of the networks, briefs in the proceeding were filed on behalf of plaintiff as well as other national networks and interested parties, discussing the issues raised by the report of the Committee. On November 28, 1940 the Commission issued a public release, annexed hereto and marked Exhibit "F", announcing oral arguments to be held before the full Commission and directed to the Committee report and to certain draft Rules. The oral arguments before the full Commission were presented by the parties on December 2 and 3, 1940. On January 2, 1941 supplementary briefs were filed on behalf of the nation-wide network organizations discussing the jurisdiction of the Commission with respect to matters covered by the Committee report and the draft Rules.

In the briefs filed in November, 1940, at the oral arguments before the full Commission and in the supplementary briefs, the plaintiff and several other respondents and parties to the proceedings in the investigation urged

1. That the Commission had no jurisdiction to promulgate regulations concerning the matters treated in the Committee Report and the draft Rules;

2. That the customs and practices proposed to be prohibited or restricted by the recommendations of the Committee Report, and the draft Rules, were indispensable to network broadcasting and to the most effective utilization of the radio facilities of the nation; and,

[fol. 9] 3. That the prohibition or restriction of these customs and practices of the industry was not required by and would not serve the public interest, convenience and necessity, was not necessary to carry out the provisions or the

purposes of the Communications Act of 1934, and was in fact contrary to the public interest, convenience and necessity and to the provisions and the purposes of the Communications Act of 1934.

As stated in Paragraph Seventh, on May 2, 1941 the Commission made its report and the order which was later amended.

On August 14, 1941 Mutual Broadcasting System, Inc. petitioned the Commission to amend Rules 3.103 and 3.104. On August 28, 1941 the Commission set the petition down for hearing on September 12, 1941 and ordered at the same time a rehearing upon all the Rules, inviting all parties to present briefs and oral arguments and suggestions, but no further testimony. On September 12, 1941 a full rehearing was had upon briefs and oral arguments. Among other parties appearing, plaintiff filed a statement and its counsel presented oral argument reiterating its former position with respect to the Rules and urging that the Commission set the Rules aside. On October 11, 1941 the Commission issued the Opinion on Rehearing and amended order.

Ninth: Prior to May 2, 1941 stations licensed by the Commission have had a reasonable expectancy of the annual renewal of their licenses, and it has been the practice of the Commission to renew the license of stations annually. The licenses held by such stations having affiliation contracts with plaintiff come up before the Commission for the granting or refusal of a renewal thereof at various times commencing in the immediate future and in no case later than one year from the present. The Commission has determined that it will revoke or deny the renewal of the license of any station having such affiliation contract after the effective date of the Rules referred to in Paragraph Seventh. When their current licenses expire, at the latest, and perhaps at an earlier date through the revocation of their existing licenses before expiration, such stations face the loss of their licenses if they perform or continue in [fol. 10] force or renew any existing contracts containing the provisions described in Paragraph Fifth.

Since the stations fear the loss of their broadcasting licenses, as a result of the Rules, they will not negotiate for or enter into the affiliation contract described in Paragraph Fifth with the plaintiff; nor will they negotiate for or

enter into the renewal of such affiliation contracts with plaintiff as have recently expired or are about to expire. One hundred fifteen stations licensed by the Commission have such contracts with the plaintiff expiring at various times between the original effective date of the Rules and December 31, 1947. Because these stations fear the loss of their licenses, as a result of the Rules, they have threatened to cancel and repudiate their affiliation contracts with plaintiff. Many stations have already notified the plaintiff that because of the Rules they will not be bound by their contracts with the plaintiff after the date when the Rules become effective as to existing contracts.

Tenth: As a result of the foregoing, plaintiff's ability and freedom to contract with existing and prospective affiliates is seriously restricted. Further, the obligations of existing contracts between stations and the plaintiff are necessarily destroyed on the effective date of the Rules. The Rules impair seriously the ability of the plaintiff to compete for national advertising with other national advertising media. They impair seriously plaintiff's ability to maintain its identity and the public goodwill which it has built up since its inception. They impair seriously the ability of the plaintiff to render a wide public service of informing, educating and entertaining the nation. They will make the operation of the plaintiff's business burdensome and more costly, reduce its earnings, compel plaintiff to change the fundamental character of its business, and render its property and business less valuable.

A network system of broadcasting, such as presently operated by plaintiff, and based upon affiliation contracts containing the provisions alleged in Paragraph Fifth herein is essential to the public interest, convenience and necessity, and indispensable to the fullest and most effective use of the radio facilities of the country. The Rules burden and weaken this network system of broadcasting to a serious extent. The Rules will thus inevitably result in decreasing the amount and quality of the radio program [fol. 11] service rendered the public, and thereby hinder and impede the most effective utilization of the radio facilities of the country.

Eleventh: That portion of the order promulgating the Rules referred to in Paragraph Seventh is illegal and void

for the reason that the Commission is without stautory authority to make such Rules.

Twelfth: That portion of the order promulgating the Rules referred to in Paragraph Seventh is illegal and void and beyond the power or authority of the Commission for the reasons that:

1. The Rules are unreasonable, arbitrary and destructive of plaintiff's business without legitimate reason.

2. The Rules are not required by and do not serve the public interest, convenience and necessity.

3. The Rules are not necessary to carry out the provisions or the purposes of the Communications Act of 1934.

4. The Rules are in fact contrary to the public interest, convenience and necessity, and to the provisions and purposes of the Communications Act of 1934.

Thirteenth: If the Communications Act of 1934 purports to authorize the Commission to make the Rules complained of, the said Act is, in this respect, unconstitutional and exceeds the powers of Congress because it delegates legislative power to the Commission without adequate legislative standards, contrary to Article I Section 1 of the Constitution of the United States, and because it takes the property of the plaintiff without due process of law in violation of Amendment V thereto.

Fourteenth: Unless the enforcement of that portion of the order referred to in Paragraph Seventh be permanently enjoined by the Court, plaintiff will be unable to negotiate with station licensees for the affiliation contracts described in Paragraph Fifth, or for the renewal of existing affiliation contracts. Station licensees threaten to and will cancel or repudiate subsisting contracts. Plaintiff's ability to negotiate contracts with advertisers and contracts with labor organizations of technical workers and of performing artists will be destroyed or seriously impaired. The penalty which affiliated stations will incur for entering into or per- [fol. 12] forming agreements contrary to the said regulations is so serious that no station will renew or perform any such existing agreements even for the purpose of testing the validity of the Rules. Unless relief is granted in this action, plaintiff will therefore be compelled to sub-

mit to the consequences of the Rules whether they are valid or not. Plaintiff's business identity and public goodwill will be substantially injured and its property and business rendered substantially less valuable. In the premises, plaintiff will suffer irreparable injury for which it has no adequate remedy at law.

Wherefore, plaintiff prays that the Court set aside, annul and permanently enjoin the enforcement of that portion of the order of the Commission which promulgates the Rules complained of in Paragraph Seventh and that the Court grant the plaintiff such other and further relief as may be just and equitable in the premises.

Signed: John J. Burns, Attorney for Plaintiff, Business and P. O. Address, 40 Wall Street, New York City.

Duly sworn to by William S. Paley. Jurat omitted in printing.

EXHIBIT "A" TO COMPLAINT

Form of Affiliation Contract

Agreement between Columbia Broadcasting System, Inc.,* 485 Madison Avenue, New York, New York and ——**
licensed to operate —— —— radio station —— —— at —— full time on a frequency of —— with a power of ——.

Columbia is engaged in operating a radio broadcasting network and in furnishing programs to radio stations on the network over program transmission lines leased by Columbia or otherwise. Some of such programs, herein called "sponsored programs", are sold by Columbia for sponsorship by its client-advertisers. All non-sponsored [fol. 13] programs are herein called "sustaining programs". The Station and Columbia recognize that the audience regularly listening to the Station will be increased, to their mutual benefit, if Columbia provides the Station with programs not otherwise locally available, including broadcasts from the scenes of national and international events, presentations of music, drama and other entertain-

---

* Herein called Columbia.

** Herein called the Station.

ment from the principal centers of talent, informative, educational and cultural broadcasts of general interest and other programs of public acceptance and value.

Accordingly, it is mutually agreed as follows:

1. Columbia will furnish to the Station for broadcasting by the Station all available network sustaining programs, without charge, and Columbia network sponsored programs for which clients may request broadcasting by the Station and which are consistent with Columbia's sales and program policies. Columbia agrees that it will make available to the Station an average of at least sixty hours per week of network sustaining and sponsored programs. Network sustaining programs made available by Columbia are for sustaining use only and may not be sold for local sponsorship or used for any other purpose without the consent of Columbia in specific instances.

2. The Station will broadcast all network sponsored programs furnished to it by Columbia during the time when the Station is licensed to operate; provided, however, that except in connection with occasional sponsored programs of special events (such as World Series broadcasts) during periods of not more than two weeks each, the Station need not in any week broadcast network sponsored programs totaling more than fifty "converted hours" (as defined below, but for this purpose computed during the entire term of this agreement on the basis of the differences in rates at different hours specified in Columbia's Rate Card No. 23). The Station may require Columbia to give not less than twenty-eight days' prior notice of the commencement of sponsored programs for new accounts. Either the Station or Columbia may on special occasions substitute for one or more of such sponsored programs sustaining programs devoted to education, public service or events of public interest without any obligation to make any payment on account thereof, and in the event of such substitution by either [fol. 14] party it will notify the other by wire as soon as practicable after deciding to make such substitution. In case the Station has reasonable objection to any sponsored program or the product advertised thereon as not being in the public interest the Station may, on three weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the Station shall be satisfied. The Station will

not make commercial spot announcements in the "break" occurring in the course of a single network program or contiguous programs for the same sponsor and will, at the request of Columbia, desist from making commercial spot announcements in the "break" occurring before or after specified network programs.

3. Columbia will pay the Station for broadcasting network sponsored programs furnished by Columbia at the rates for "converted hours" specified in Schedule A attached hereto and hereby in all respects made a part hereof. A "converted hour" means an aggregate period of one hour during which there shall be broadcast over the Station one or more network sponsored programs for which Columbia shall charge its full night-time card rate for the Station. An aggregate period of one hour during which there shall be broadcast over the Station one or more network sponsored programs for which Columbia shall charge a fraction of its night-time card rate, such as its day-time card rate, shall be the equivalent of the same fraction of a "converted hour". Fractions of an hour shall for all purposes be treated as their fractional proportions of full hours at the same time of the day.

Payment to the Station will be made by Columbia for network sponsored programs broadcast over the Station within twenty days following the termination of Columbia's four or five week fiscal period, as the case may be, during which such sponsored programs were broadcast.

4. The Station will maintain and operate its facilities in accordance with the best practice in the broadcasting art and conduct of the industry and in accordance with good engineering practice, and will have such license or other agreements as shall be necessary to entitle the Station to broadcast copyrighted material included in programs to be furnished by Columbia.

[fol. 15] 5. If the power, frequency, time or manner of operation of the Station is changed, resulting in a substantial lessening of the value of the Station as an outlet for Columbia network programs, Columbia may at any time thereafter terminate this agreement on at least sixty days' notice to the Station.

6. Columbia will whenever practicable provide in advance notices of the programs to be furnished to the Station.

In the event of any change of programs, Columbia will notify the Station as soon as possible and the Station will make every effort immediately to conform with the substituted programs.

7. Neither party shall be liable to the other for claims by third parties or for failure to operate facilities or supply programs for broadcasting if such failure is due to failure of equipment or action or claims by network clients, labor disputes or any cause or reason beyond the party's control.

8. Columbia will continue the Station as the exclusive Columbia outlet in the present standard broadcast band in the city in which the Station is located and will so publicize the Station, and will not furnish its exclusive network programs to any other station in the present standard broadcast band in that city, except in case of public emergency. The Station will operate as the exclusive Columbia outlet in the present standard broadcast band in such city and will so publicize itself, and will not join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations. The Station shall be free to join occasional local, state-wide or regional hook-ups to broadcast special events of public importance.

9. The obligations under this agreement are subject to all applicable laws, rules and regulations, present and future, especially including rules and regulations of the Federal Communications Commission.

10. If the Station applies to the Federal Communications Commission for consent to a transfer of its license or proposes to transfer all or any of its assets without which it would be unable to perform this agreement, it will procure the agreement of the proposed transferee that, upon the consummation of the transfer, the transferee will assume [fol. 16] and perform this agreement, unless Columbia shall waive this condition in writing.

11. If either the Station or Columbia fails to insist upon strict performance of any of the covenants or conditions of this agreement, such failure shall not be construed as an election or as a waiver or condonation of any breach, or as a waiver or relinquishment for the future of any such covenants or conditions.

12. Columbia agrees that in the event it desires to offer television programs or program material or other programs or program material generally to television, short wave or ultra short wave stations, or to other stations not in the regular broadcast band, it will offer the same to any television, short wave or ultra short wave station, or other station not in the regular broadcast band, located in the city in which the Station is located, which may be owned by or affiliated with the Station before offering the same to any other such station located in the city in which the Station is located. The Station agrees that in the event it becomes the owner of or affiliated with any television, short wave or ultra short wave station, or other station not in the regular broadcast band, located in the city in which the Station is located, no arrangements shall be made involving the supplying to such station of television programs or program material or other programs or program material until Columbia shall have been advised of the terms of any such proposed arrangements and shall have been given a reasonable opportunity to enter into similar arrangements with the Station upon terms as favorable to Columbia.

13. Any notice hereunder shall be sent to the parties at their respective addresses hereinbefore set forth.

14. This agreement has been made in the State of New York and shall be governed by the laws of that State applicable to contracts fully to be performed therein, and this agreement is not subject to oral modification.

15. As of the beginning of the term hereof, this agreement takes the place of and is substituted for any and all agreements heretofore existing between the parties hereto, subject only to the fulfillment of any accrued obligations thereunder.

[fol. 17] The term of this agreement shall begin on ——, ——, provided, however, that this agreement may be terminated at any time prior thereto by Columbia by sending written notice to the Station at least twelve months prior to the effective date of termination specified therein.

In Witness Whereof, this agreement has been signed by the parties and dated the — day of ——, 19—.

Columbia Broadcasting System, Inc., by —— ——,

——, by —— ——.

Exhibit "B" to Complaint

Before the Federal Communications Commission

Washington, D. C.

Commission Order in Docket No. 5060

In the Matter of the Investigation of Chain Broadcasting

May 2, 1941

Whereas, the Commission on March 18, 1938, by Order No. 37, authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity;"

Whereas, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission;"

Whereas, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

Whereas, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

Whereas, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached;

[fol. 18] Now, Therefore, It Is Hereby Ordered, That the following regulations be and they are hereby adopted:

3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization [1] under which the station is prevented or hindered from, or penalized for broadcasting the programs of any other network organization. See Chapter VII, A, 1.

3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or under-

[1] The term "network organization," as used herein, includes national and regional network organizations. See Chapter VII, J.

standing, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. See Chapter VII, A, 2; and J.

3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: *Provided,* That a contract, arrangement, or understanding for a one-year period, may be entered into within sixty days prior to the commencement of such one-year period. See Chapter VII, B.

3.104. No license shall be granted to a standard broadcast station, having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time. See Chapter VII, C.

3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or under-
[fol. 19] standing, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. See Chapter VII, D.

3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by

or under common control [2] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. See Chapter VII, E.

3.107. No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network. See Chapter VII, F.

3.108. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. See Chapter VII, G.

[fol. 20] It Is Further Ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements, or understandings or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.

Federal Communications Commission, T. J. Slowie, Secretary.

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[2] The word "control," as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

Exhibit "C" to Complaint

Opinion on Rehearing

October 11, 1941.

On May 2, 1941, the Commission promulgated its Report on Chain Broadcasting acompanied by eight regulations setting forth a statement of the policy to be followed by the Commission in licensing stations owned by or affiliated with network organizations. The concluding paragraph of the order promulgating the regulations dealt with their effective date, which, with respect to existing affiliation contracts and station licenses, was set at 90 days from the date of the order.[1] On June 13, 1941 the Commission amended the concluding paragraph of the order to clarify its intent that the 90-day deferment period mentioned in that paragraph should apply to the disposal of one NBC network as well as to the disposition of individual stations by networks, and further that the effective date of compliance in either case might be extended from time to time in order to permit the orderly disposition of properties.

Extensive hearings before the Senate Committee on Interstate Commerce were held during June, 1941 on the White Resolution[2] which called for a study of the Commis- [fol. 21] sion's Chain Broadcasting Regulations. During July and August, following these hearings; representatives of NBC, CBS, and Mutual held a series of conferences with the Chairman of the Commission, its General Counsel and members of his staff, and in, the later stages, with Commissioner Walker. Representatives of some of the regional

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[1] *Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060, May, 1941.

[2] Senate Resolution No. 113, 77th Congress, 1st Session. The Resolution, introduced by Senator White, provided for an investigation of the probable effects of the regulations upon the broadcasting industry and of the authority of the Commission to promulgate and enforce them, and also requested the Commission to postpone the regulations until 60 days after the Senate Interstate Commerce Committee reported to the Senate. The hearings before the Committee were adjourned on June 20, 1941, subject to the call of the Chairman.

networks and some of the affiliates also conferred with members of the Commission and its staff during this period.[3] These conferences were devoted to a discussion of the Chain Broadcasting Regulations, with particular emphasis upon the provisions dealing with network option time. On July 22, 1941, during the course of these conferences, the Commission, on petition of NBC and CBS, postponed the effective date of its Order of May 2, 1941, as to existing affiliation contracts, network organization station licenses, or the maintenance of more than one network by a single network organization, from July 30 until September 16, 1941.

At the termination of these conferences, the Mutual Broadcasting System on August 14, 1941, filed with the Commission a petition requesting it to amend its regulations dealing with network option time and the duration of affiliation contracts. The Mutual petition requested that the Commission permit affiliation contracts up to two years in duration and allow stations to option exclusively to one network the particular periods of time utilized by the network for network commercial programs during the preceding year and to option additional time to one or more networks on a non-exclusive basis; in either case the station to reserve several hours per day free from any network option. On August 28, 1941, Mutual's petition was set for argument before the Commission *en banc* on September 12, 1941 and the Commission announced that at that time it [fol. 22] would also hear any other network organizations or licensees who desired to be heard with respect to the Chain Broadcasting Regulations as promulgated, the Mutual petition, or any other modification of any of the Chain Broadcasting Regulations which those appearing desired to propose. The Commission further announced that the Chain Broadcasting Regulations would not be placed in effect with respect to existing affiliation contracts, or network organization station licensees, or the maintenance of more than one network by a single network organization, until after the disposition of the Mutual petition and of any other which might be filed. Oral arguments on the Mutual petition were heard before the Commission *en banc*

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[3] *Cf.* Report of the Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong. 1st Sess., (1941) pp. 35-42.

on September 12, 1941. Oral arguments were presented on behalf of the Mutual Broadcasting System, the National Broadcasting Company, the Columbia Broadcasting System, and the Colonial and Yankee Networks, and briefs were filed on behalf of the three nation-wide network organizations.

After a careful study of the testimony presented before the Senate Committee on Interstate Commerce, of the considerations presented at the conferences which followed the hearings, and of the oral arguments presented at the hearing on Mutual's petition and of the briefs filed at that time, and after a thorough reconsideration of the entire subject, the Commission has decided to amend three of the Chain Broadcasting Regulations to read as follows:

Regulation 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Regulation 3.103. No license shall be granted to a standard broadcast station having any contract arrangement, or [fol. 23] understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

Regulation 3.104. No license shall be granted to a standard broadcast station which options[1] for network programs

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[1] As used in this regulation, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents

any time subject to call on less than 56 days' notice, or more time than a total of three hours [2] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.[3] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

Territorial Exclusivity

At the hearings on the White Resolution it was argued on behalf of NBC and Columbia that Regulation 3.102 would [fol. 24] permit the largest and most powerful stations in each city to take most of the desirable network business away from the smaller and less powerful stations, and that the elimination of territorial exclusivity would prevent a regular affiliation between a network organization and a station.

In order to clarify the meaning of Regulation 3.102 the Commission has determined to add the following sentence to that regulation:

"This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station

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or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

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[2] All time options permitted under this regulation must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified option hours correspondingly as agreed by the station and network organization.

[3] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."

This sentence does not change the meaning[1] of Regulation 3.102 but is intended to eliminate confusion with respect to its interpretation. Regulation 3.102 is not intended to and does not prohibit a regular affiliation contract whereby a network agrees to make a first offer of all its programs to one particular station in a given community. The Commission believes, however, that in the case of non-commercial public service programs of outstanding national or international significance, such first offer should not constitute an exclusive offer and that the network should be left free to furnish such programs to other stations in the same area.

Duration of Affiliation Contracts

Under present rules the license of a standard broadcast station is limited to one year. The broadcast industry has reached a point of maturity where it appears advisable to increase the license period of standard broadcast stations to two years. The Commission believes that this action will bring an increased measure of stability to the broadcast industry without any detrimental results. By separate ac- [fol. 25] tion taken this day we are amending Sections 3.34 and 4.3 of our rules to accomplish this result.

In connection with the extension of the license period for all standard broadcast stations from one year to two years, the Commission has determined to license stations which have entered into affiliation contracts whose term is not longer than two years. In its report, the Commission found that the five-year affiliation contracts entered into by NBC and CBS were intended to prevent any real competition in the network-station market, and that such long term contracts were a substantial factor in suppressing such competition. The Commission found that as a result the

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[1] In its public notice No. 51314 dated June 19, 1941, the Commission informally approved the new Mutual network form of contract which contained a provision giving the station the first call on Mutual network commercial and sustaining programs in the city in which the station is located.

public lost the benefits of competition between stations for affiliation with the existing networks, and was also deprived of the advantages that might flow from the establishment and development of new networks. In its report of May 2, 1941, the Commission found that no business need was shown for an affiliation contract longer than one year. The Commission also found that competition would be fostered if opportunity were provided for annual readjustments on the basis of comparative showings of networks and stations.

After a consideration of the arguments presented on Mutual's petition and a reconsideration of the entire subject of the duration of affiliation contracts, the Commission concludes that a two-year affiliation contract will permit a reasonable measure of stability in network-station relationships without at the same time seriously interfering with competition in the net-work-station market. Of course, what precise limit on the duration of affiliation contracts is most desirable is a matter of judgment. A two-year affiliation contract represents a substantial diminution from the five-year term currently being utilized by NBC and CBS, and may be expected to remove that restraint upon competition and give freer play to competitive factors by making possible readjustments between stations and networks on a biennial basis.

Network Option Time

The option-time regulation promulgated by the Commission on May 2, 1941 (Regulation 3.104), prohibited all optioning of time by stations for network programs. That regulation was based upon the finding of the Commission that the optioning of time by licensee stations restricted [fol. 26] their freedom, interfered with their ability to serve local program needs, hampered their efforts to broadcast local programs, national spot, and other non-network programs, and restricted competition in network programs.

Notwithstanding these serious restraints imposed upon station licensees by network options, NBC and CBS utilize only a fraction of the valuable broadcast hours which they place under option. The NBC option for most of its affiliates covers 8 or 8½ specified hours per day, while the CBS option covers the entire broadcast day. Upon 28 days' notice, NBC and CBS may call upon their outlets to carry network commercial programs during the optioned time and

to move whatever other programs they may have scheduled during those periods. In 1938 NBC used for network commercial programs only 58.1 per cent of the optioned time of stations on the basic Red network and only 19.4 per cent on the basic Blue network and CBS used only 39 per cent of the optioned time of its basic stations. The Commission found that this great disparity between option and use was an abuse which seriously interfered with the non-network program service of station licensees and restricted the broadcasting of programs of other networks.

The Commission is not convinced by the contention of NBC and CBS that the optioning of time by networks is indispensable to network operations, particularly since the chain broadcasting regulations, neither in their original form nor as herein amended, place any restrictions on the bona fide purchase of station time by networks. Networks have heretofore successfully operated without option time. However, it is clear that some optioning of time by networks in order to clear the same period of time over a number of stations for network programs will operate as a business convenience. Within certain limits, it should be possible for stations to option time for network programs without interfering too seriously with their local program requirements, with their local and national spot business, and without restricting the access of competing networks to those stations. The Commission believes that the option-time regulation as herein amended accomplishes that result.

Under the amended regulation the broadcast day is divided into four segments: 8 a.m. to 1 p.m.; 1 p.m. to 6 p.m.; 6 p.m. to 11 p.m.; and 11 p.m. to 8 a.m. A station is permitted to option up to three hours during each segment [fol. 27] to one or more network organizations on a non-exclusive basis. The regulation provides that the hours covered by option must be specified hours for, if a roving option were permitted, the station would be effectively prevented from scheduling any non-network programs during any of the hours on which such roving option might conceivably settle. Stations are prevented by the regulation from optioning any time to networks subject to call on less than 56 days' notice. The call period currently being utilized is 28 days. This lengthening of the call period will give stations greater freedom in scheduling local and non-network national programs during the hours of the broadcast day which are subject to network option; for

such programs, even though subject to be moved, may be assured of at least eight weeks of continuous broadcasting. Nor does it seem that the increase in the call period will seriously affect national network business; for the national networks have pointed out that theirs is a long-range business and that large-scale national advertising network programs are usually planned and arranged for many months and even a year or two ahead of the actual commencement of the broadcasts. Under such circumstances, it does not appear that a 56-day call period will impose any serious hardship upon national network operations.

One of the results of the amended option-time regulation will be that during at least two specified hours within each of the important three segments of the broadcast day—morning, afternoon, and evening, a sation may not option time for network programs, so that non-network programs may be scheduled during these hours without fear of removal as a result of network options. During the night segment, from 11 p.m. to 8 a.m., a station may option up to three hours for network programs. For the most part, programs broadcast within those hours have been local programs; but some networks, Colonial, for example, have originated programs during the early morning or late evening hours which have been broadcast by their outlets with apparent wide listener acceptance.

The amended option-time regulation does not require any station to option any time to any network; it simply sets the maximum amount of time which a station may place under option for network programs. Stations and networks are free to negotiate which specific hours are to be placed under option and how many hours, within the limits speci- [fol. 28] fied in the regulation, are to be placed under option. A network, by virtue of whatever option it is successful in negotiating, to that extent secures the right-of-way over local and national non-network programs during the time under option. But during at least two specified hours within each of the three more important segments of the broadcast day and during at least six hours of the night segment a station may not option time for network programs. Local and non-network national programs being broadcast within such periods may not be subjected to be moved as a matter of contract in order to accommodate network programs, and the networks may utilize such hours only by the outright purchase of time.

It has been the consistent intention of the Commission to assure that an adequate amount of time during the good listening hours shall be made available to meet the needs of the community in terms of public expression and of local interest. If these regulations do not accomplish this objective, the subject will be given further consideration.

By providing that the options for network programs must be on a non-exclusive basis, the amended option-time regulation prevents the option-time device from being utilized to restrain competition offered by other networks. While a station is not compelled to option the same hours to more than one network, it may not enter into any arrangement with one network organization which prevents it from optioning or selling the same or other time to other network organizations. This is an all-important consideration in the many cities which contain only three full-time stations to which all four national networks seek access. Where a station options the same period of time to several networks, the mere existence of the option will not preclude network competition; for that period of time will be available for sale by all the networks holding the option. The first network which is successful in selling any particular period under option will, of course, reap the benefit of the option as long as the time remains sold. Although they have used only a fraction of the optioned time of their outlets, CBS and NBC have been able to prevent a competing network from using the unused time of their affiliates simply because those periods are under option to them. Under the amended option-time regulation, NBC and CBS will be able to exclude other networks only in the event and to the extent that they actually utilize the time under option. [fol. 29] The non-exclusive option should be instrumental in fostering competition between networks and at the same time should make it possible for a network organization to clear time over a number of stations for a network program. Without any optioning of time, the greatest obstacle in the way of clearing the same period of time over a number of stations for a network program would be the fact that many of the stations might have scheduled local and non-network national programs during various periods of the broadcast day. During whatever period of time is included within the non-exclusive option, local and non-network national programs will be subject to be moved on 56 days' notice. A station must remain free, however, to

sell or option time, included within the non-exclusive option period but not actually being utilized for a network commercial program, to one or more other network organizations.

After weighing the considerations in support of the non-exclusive option against those advanced in opposition, the Commission has come to the conclusion that the non-exclusive option appears to be a particularly appropriate solution of the problem of clearing time for network programs and at the same time of fostering competition in the network-station market.

The Commission has rejected the proposal, suggested but not unqualifiedly recommended in the Mutual petition, to permit a station to option exclusively to one network the particular periods of time utilized by that network for network commercial programs over the station during the preceding year. An exclusive option effectively removes a station from the station-network market with respect to all the time it covers. The Commission believes that such a serious restraint upon competition is inconsistent with the freely competitive system contemplated by Congress in the Communcations Act of 1934. An exclusive option, to the extent that it encompasses the most valuable broadcast hours, approaches the effectiveness of the exclusivity clauses in affiliation contracts in denying other networks access to a station, and is therefore objectionable for many of the reasons given in the Report for the elimination of exclusive affiliation. Nor is the fact that a given network has utilized a particular period of time over a station any real justification for placing that time under exclusive option. The network which has a contract for a commercial [fol. 30] program with a sponsor and which has been sending that program to a number of its affiliated stations throughout a season already has an almost insuperable advantage in selling that program for another year; for commercial program series are frequently renewed year after year. To permit such a network to have an exclusive option over its affiliated stations on the periods used for commercial network programs would effectively destroy the possibility of competition for those periods.

Multiple Network Operation by NBC

The Commission has determined to suspend indefinitely Regulation 3.107, which provides that no license shall be

granted to a standard broadcast station affiliated with a network organization which maintains more than one network. Separate ownership of what are now the Red and Blue networks of NBC is so generally recognized to be desirable that we believe a separation will soon occur without the spur of a legal mandate. Any policy requiring the sale of substantial properties should be applied with due regard for the preservation of fair values, and the Commission wishes to avoid the semblance of pressure on NBC to effect a forced sale.

In addition to suspending this regulation, the Commission has provided that any subsequent order placing the regulation in effect shall provide for a period of at least six months between the announcement and the effective date, and for further extension of the effective date from time to time if necessary to prevent a forced sale. As amended, the paragraph setting forth the effective date of the Chain Broadcasting regulations reads as follows:

"IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely, and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice [fol. 31] and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

Other considerations have motivated the Commission in this decision. The Commission is desirous of seeing that the network which is disposed of by NBC is transferred to a responsible new owner as a going organization with its personnel, talent, programs and stations intact as far as possible. NBC's existing affiliation contracts and those that it may negotiate in the future will be an important factor in the continued profitable and efficient operation of its networks. Therefore, pending the development of plans

for the disposition of one of the NBC networks as a unit, the Commission has deemed it wise to suspend this regulation.

Conclusion

The Commission adheres to the views expressed in its report on Chain Broadcasting. It is of the opinion that the chain br-adcasting regulations will tend to decentralize the tremendous power over what the public may hear which is now lodged in the major network organizations, and will remove existing restraints upon competition without interfering unduly with the operations of the network organizations. The Commission has further concluded, however, that the regulations may be amended as set out above without sacrifice of these objectives, and that the amendments will additionally insure that no aspect of the network broadcasting structure will be unnecessarily or unduly disturbed.

For the reasons stated at pages 77 to 79 of its Report, the Commission has determined that its chain broadcasting regulations should be applicable to regional as well as national networks. Special circumstances and considerations may be applicable in the case of regional networks, and the Commission will examine any further representations on their behalf with especial care.

The Commis-ion stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network-operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances [fol. 32] the chain broadcasting regulations should not be applicable to any particular situation.

FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D. C.

October 11, 1941.

ORDER

At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 11th day of October, 1941.

The Commission having under consideration the petition of the Mutual Broadcasting System, filed August 14, 1941, requesting that the Commission amend its order entered in Docket No. 5060 promulgating regulations appli-

cable to radio stations engaged in chain broadcasting by modifying the regulations dealing with option time and the duration of affiliation contracts, having heard oral argument on said petition and having reconsidered its report and order in Docket No. 5060,

It Is Ordered, That the Commission's order of May 2, 1941, entered in Docket No. 5060, Be, and the Same is Hereby, Amended in the following particulars:

Sections 3.102, 3.103, and 3.104 of the Regulations set forth in said order are hereby amended to read as follows:

Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a network organiza- [fol. 33] tion which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

Section 3.104. No license shall be granted to a standard broadcast station which options [1] for network programs any

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[1] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

time subject to call on less than 56 days' notice, or more time than a total of three hours [2] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.[3] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

The last paragraph of said order is hereby amended to read as follows:

"It Is Further Ordered, That these regulations shall become effective immediately: *Provided*, That, with respect [fol. 34] to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

T. J. Slowie, Secretary.

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[2] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

[3] These segments are to be determined from each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

DISSENTING OPINION OF COMMISSIONERS NORMAN S. CASE AND T. A. M. CRAVEN, OCTOBER 11, 1941

We disagree with the supplemental report of the Commission on Chain Broadcasting, in Docket 5060, for the same basic reasons previously outlined in our dissenting opinion, filed with the Commission's original report on this matter, dated May, 1941. We remain convinced that the majority of the Commission exceeds the power delegated to the Commission in the Communications Act of 1934. We also are convinced that the aggregate effect of the proposed rules will not result in a broadcasting system more in the public interest than that of today. We fear that the nation's radio service may be seriously impaired at a time when efficient service is most needed. Furthermore, we believe that the effect of the rules is certain to result in deterioration of the present excellent public service programs now rendered to the nation by the radio industry.

The effect of the regulations will be to change radically the business structure of the broadcast industry. The present is no time to force revolutionary reforms upon an industry which has served the public interest of the nation, particularly when such reforms bear no relation whatsoever to the national defense effort. The radio industry has cooperated wholeheartedly with the Government in this national emergency in spite of the fundamental and imminent changes in the national economic structure. These economic changes may cause vast readjustments in all industry as well as by the entire public. The cumulative effect of these [fol. 35] basic national economic readjustments upon the radio industry cannot be determined with accuracy at this time. Therefore, it appears to us that to add to the instability of the radio industry by enforcing new Government regulations, which in themselves superimpose fundamental economic readjustments, is unwise. There is no evidence in this record which justifies such a sweeping change as is compelled by these new rules promulgated by the majority of this Commission. Any improvements which may seem desirable in the operation of the existing broadcast structure can be obtained in an evolutionary manner by far less harsh measures than those proposed by the majority in the instant case.

We do not condone unreasonable restraints upon competition within the broadcasting industry of this country, and

therefore, advocate that if any abuses of this nature exist, they should be corrected forthwith either by voluntary action within the industry or else by procedures undertaken by agencies of the Government having legal jurisdiction in the premises. Likewise, we subscribe to the doctrine of reasonable diversification in the control of the radio broadcasting channels. It is for this latter reason that we believe the ultimate separation of one of the two networks now operated by the National Broadcasting Company will be an improvment of benefit to the public.

In this respect, however, we believe that the Government should not force private enterprise to dispose of its property on an unsound business basis when such enterprise has rendered good service to the public, and particularly when, as in this case, the Government itself has previously given its tacit approval and encouragement to the enterprise. Consequently, we welcome the fact that the majority has suspended the effective date of its original regulation (Sec. 3.107) to force the sale of one of the networks now operated by the National Broadcasting Company.

Our present objection is centered on the modified regulation, 3.104. Ostensibly this regulation permits options to be taken by a network on an affiliated station's time. In reality, however, an affiliate must be free to option identical time to all networks regardless of affiliation. Under such conditions it should be obvious that absurd complexities may easily arise in the ordinary conduct of business. It is true that another regulation permits a station to contract with a network for first call on a network's program offerings. [fol. 36] If it be reasonable for an affiliate to contract for first call on a network's programs, it is obviously reasonable for the network to obtain first call on the affiliate station's time. However, the latter is specifically prohibited by the regulation. Apparently by changing the regulation originally promulgated, the majority intended to recognize the practical business situation in broadcasting. It is our opinion that the new regulation does not accomplish this purpose and that networks in reality secure no substantial option privileges under this regulation. We believe that stations should be permitted to utilize the same option principles as is done in ordinary business.

The time has come to create stability in the radio industry rather than instability. We believe that service to the public would be enhanced by extending the broadcast sta-

tion license period to the legal limit of three years. Network companies should be permitted to contract for regular affiliates with which they can engage in business in accord with sound business principles. In this connection we believe that an improvement in the existing situation can be obtained if network affiliates are free at all times to exercise final judgment as to whether or not any program offered to them by the network will service public interest in the community served by the station. We also believe that the affiliates should have equal power with the networks to terminate the affiliates' contract on due notice.

(Signed) Norman S. Case. (Signed) T. A. M. Craven.

October 11, 1941.

EXHIBIT "D" TO COMPLAINT

Order Instituting Chain Broadcasting Investigation

Federal Communications Commission,
Washington, D. C.

March 18, 1938.

Order No. 37

Whereas under the provisions of section 303 of the Communications Act of 1934, as amended, "the Commission, from time to time, as public convenience, interest, or neces- [fol. 37] sity requires, shall—(1) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and

Whereas the Commission has not at this time sufficient information in fact upon which to base regulations regarding contractual relationships between chain companies and network stations, multiple ownership of radio broadcast stations of various classes, competitive practices of all classes of stations, networks, and chain companies, and other methods by which competition may be restrained or by which restricted use of facilities may result; Now therefore,

It is ordered, That the Federal Communications Commission undertake an immediate investigation to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity; such investiga-

tion to include an inquiry into the following specific matters, as well as all other pertinent and related matters, including those covered in the report on social and economic data prepared by the Engineering Department of the Federal Communications Commission and filed with the Commission on January 20, 1938:

1. The contractual rights and obligations of stations engaged in chain broadcasting, arising out of their network agreements.

2. The extent of the control of programs, advertising contracts, and other matters exercised in practice by stations engaged in chain broadcasting.

3. The nature and extent of network program duplication by stations serving the same area.

4. Contract provisions in network agreements providing for exclusive affiliation with a single network and also provisions restricting networks from affiliation with other stations in a given area.

5. The extent to which single chains or networks have exclusive coverage in any service area.

6. Program policies adopted by the various national and other networks and chains, with respect to character of programs, diversification, and accommodation of program characteristics to the requirements of the area to be served.

[fol. 38] 7. The number and location of stations licensed to or affiliated with each of the various national and other networks. The number of hours and the specified time which such networks control over the station affiliates and the number of hours and the specified time actually used by such networks.

8. The rights and obligations of stations engaged in chain broadcasting so far as advertisers having network contracts are concerned.

9. Nature of service rendered by each station licensed to a chain or network organization, particularly with respect to amount of program origination for network purposes by such stations.

10. Competitive practices of stations engaged in chain broadcasting as compared with such practices in the broadcasting industry generally.

11. Effect of chain broadcasting upon stations not affiliated with or licensed to any chain or network organization.

12. Practices or agreements in restraint of trade or furtherance of monopoly in connection with chain broadcasting.

13. Extent and effects of concentration of control of stations locally, regionally, or nationally in the same or affiliated interests, by means of chain or network contracts or agreements, management contracts or agreements, common ownership or other means or devices, particularly insofar as the same tends toward or results in restraint of trade or monopoly.

It It Further Ordered, That hearings be held in connection with such investigation at such times and places as the Commission shall designate.

It Is Further Ordered, That a copy of this order be posted in the office of the Secretary and that a copy of the same be mailed to each licensee of a broadcast station and to each chain and network organization.

By the Commission.

T. J. Slowie, Secretary.

[fol. 39] EXHIBIT "E" TO COMPLAINT

Federal Communications Commission,

Washington, D. C.

September 20, 1938.

To Licensees of All Standard Broadcast Stations:

In Re: Commission Order No. 37, Docket No. 5060

GENTLEMEN:

Enclosed herewith find hearing notice issued with reference to Order No. 37 on which a hearing is scheduled to be held October 24, 1938 at the offices of the Commission in Washington, D. C., and a copy of said Order.

Also enclosed is an itemized list of the matters concerning which each network has been requested to furnish complete and detailed information at the hearing.

The Commission in its investigation under Order No. 37 plans to make a comprehensive study of all contracts, agreements and other arrangements between licensees of broadcast stations and other persons or organizations which involve the management, control, or operation of such stations. You are therefore directed to file within ten days from the date hereof, in triplicate, with the Commission copies of all such contracts or agreements affecting your station and a memorandum stating the substance of any such contract, agreement, or arrangement which has not been reduced to writing, together with a verified statement setting forth in detail the manner and extent to which the same affect in practice the management, control or operation of your station. This statement should include the names and addresses of the persons or organizations who are parties to the same. Any of this information which may have already been filed with the Commission may be incorporated by an appropriate specific reference. You will be advised as soon as possible after the receipt of this information whether or not the Commission will require that you present through a qualified witness or witnesses at the hearing any further information with respect to this matter.

If you have access to or possess any evidence bearing on any phase of the investigation which you believe should be [fol. 40] presented for the consideration of the Commission, a notice of appearance should be filed in conformity with the notice of hearing, which is enclosed herewith.

You are also directed to file at the same time a detailed statement, properly verified, covering the kind and amount of electrical transcriptions or other recordings your station has used and now uses for program purposes, and your past and present relations with, and extent to which through stock ownership, contract or otherwise you control or are controlled by companies engaged in producing or distributing such recordings.

The order in which appearances will be called at the hearing will be published by the Commission as far in advance of the date of hearing as possible.

Very truly yours, (Signed) T. J. Slowie, Secretary.

Enclosures.

(First Enclosure)

29491

Federal Communications Commission

Washington, D. C.

Notice of Hearing

In the Matter of Commission's Order No. 37

Docket No. 5060

Pursuant to Commission's Order No. 37 notice is hereby given that commencing at 10:00 A. M., October 24, 1938, at the offices of the Commission, Washington, D. C., the Commission will hear any person or organization desiring to present evidence on the matters included for investigation in Commission order No. 37.

Any person or organization desiring to be heard shall, within fifteen days from the date of this notice, file with the Commission a verified notice of its intention to be present and participate in said hearing and shall set forth in detail a complete statement of the evidence to be offered by such person or organization. An original and eight copies of such notice of appearance shall be filed.

Dated at Washington, D. C., September 20, 1938.

Federal Communications Commission, T. J. Slowie (Signed), Secretary.

[fol. 41] (Second Enclosure)

29484

Matters as to Which Each Network Shall Present Evidence at the Hearing Held Pursuant to Order #37

1. Corporate and financial history of network organization including detailed information on both direct and indirect ownership or control thereof;

2. Nature and character of activities engaged in by network from the date of its organization;

3. Name, number and location of all stations now or previously licensed to or affiliated in any manner with network with particular reference to the reasons for entering into

or terminating any such affiliation and the basis upon which additional affiliations are entered into;

4. Nature of contracts, agre-ments or other arrangements between network and affiliates including reasons for various provisions of such contracts, agreements, or other arrangements, and history of the same;

5. Classification and grouping of stations connected with network as basic supplemental, etc., with reasons for same;

6. Financial arrangements between stations and affiliates, including basis for charges made by networks and affiliates;

7. The history and development of the network program policy, particularly with reference to standards which programs must meet, diversification, accommodation of program characteristics to the requirements of the area served, and program and advertising continuity;

8. Extent to which affiliates are required to conform to network program policy and extent to which affiliates control or influence policy;

9. History and development of operating policy and procedure with particular reference to contracts and agreements with wire companies for program transmission;

10. History and development of policy with respect to sale of time for advertising or other purposes, particularly with respect to standards applicable to products or services for which advertising is accepted;

11. Detailed information as to the hours which network controls over affiliated stations, the number of such hours actually used for network, commercial purposes over affiliated stations and the number of hours of network sustaining programs actually used by affiliates;

[fol. 42] 12. Rights of network and affiliates in event affiliate desires to substitute a local program for a network program.

13. History and development of agreements, contracts, or other arrangements between networks and advertisers, or other program sponsors, particularly and in detail agreements, contracts, or other arrangements with persons or organizations acting as agencies for the placing of broadcast advertising or the sale of time over the network;

14. History and development of policies with reference to the development of program talent and facilities of network organization devoted to that purpose;

15. Explanation and details of the organization, function, policies and practices of any agency directly or indirectly controlled by the network organization which retains and procures talent for the purpose of selling such talent to the sponsors of commercial radio programs;

16. The nature of the service rendered by each station licensed to the network, particularly with respect to the amount of program origination for network purposes at such stations and with respect to the nature of the local service rendered by such stations;

17. Name of any national advertising agency, user, or national representative of a station whose officers, directors, stockholders or proprietors hold any securities of the network organization, and the exact extent of such holdings;

18. Name of any national advertising agency, user, or national representative of a station, the securities of which are held by the network, its officers, directors, or proprietors;

19. Any relationship that may exist between the network and any national advertising agency, user, or national representative of a station through officers, directors, proprietors, employees, or security holders in common, and the exact nature and extent of such relationship;

20. Extent of program duplication in the primary and secondary service areas of stations carrying the network programs, particularly the percentage of population in the primary service area of each network station which may receive a network program as primary service from such station and from other network stations, the percentage of secondary service area of each network station which receives a network program as secondary service from such station and from other network stations, the number and extent [fol. 43] of such duplications and amount of duplication required for adequate service on chain programs. The primary and secondary service areas shall be considered as defined in the Commission's proposed Rules and Regulations governing standard broadcast stations and Standards of Good Engineering Practices concerning the same.

Exhibit "F" to Complaint

Procedure for Oral Argument on Network Inquiry Report

Federal Communications Commission,
Washington, D. C., November 28, 1940.

The Federal Communications Commission today announced procedure for the oral argument on the committee network inquiry report made public June 12, 1940.

The hearing is scheduled for Monday and Tuesday, December 2 and 3, in hearing room A, Interstate Commerce Commission Building, starting at 10:30 a. m.

Each party will be allowed a maximum of 1 hour of argument on the issues of fact and policy raised in the committee report. The order of argument will be as follows: National Broadcasting Co.; Columbia Broadcasting System; Independent Radio Network Affiliates, Inc.; Don Lee Broadcasting System; Mutual Broadcasting System; Roy L. Albertson (WBNY); Rock Island Broadcasting Co. (WHBF); Voice of Longview (KFRO); World Broadcasting System, Inc.; Association of Radio Transcription Producers of Hollywood, Inc.; American Federation of Musicians; Independent Artists' Representatives; Associated Music Publishers, Inc.

In order to facilitate the oral argument, counsel are requested to consider the advisability and effect of the promulgation by the Commission of the following special regulations with respect to chain broadcasting. In several instances these suggestions are in the alternative, and the Commission desires to hear argument on the advisability and effect of alternative suggestions. It is to be understood that the regulations have not received the approval of the Commission, and are to be taken as suggestions by the Commission intended to focus the attention of counsel upon the issues raised in the report. It should also be understood [fol. 44] that counsel are not in any way limited to a discussion of these regulations but may address themselves to any of the issues of fact or policy raised by the report of the chain broadcasting committee.

1-A. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which provides for or has the

effect of establishing an exclusive affiliation with the network organization.

or

1-B. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which provides for or has the effect of establishing an exclusive affiliation with the network organization; *Provided*, That such restriction shall not apply to licensees of stations located in or rendering primary service to cities receiving adequate primary service from five or more full-time stations.

2. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with any network organization which gives the network organization an option on the hours of operation of the licensee's station for the broadcasting of commercial programs (a) for more than 30 percent of the converted hours of operation in any city receiving adequate primary service from three full-time stations with comparable facilities; (b) for more than 20 percent of the converted hours of operation in any city receiving adequate primary service from two full-time stations with comparable facilities; (c) for more than 10 percent of the converted hours of operation in any city receiving adequate primary service from one full-time station; (d) for a total number of converted hours exceeding by more than 25 percent the converted hours during which such licensee has broadcast commercial programs transmitted to the licensee by the network organization during the 6 months preceding the effective date of the contract.

3-A. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with any network organization, the terms of which exceed in duration the effective period of the license granted by this Commission. For the purposes of this section, an agree-[fol. 45] ment shall be considered as exceeding in duration the effective period of the license if the agreement gives either party an option to extend the contract beyond the termination of the license; *Provided*, That this restriction shall not be construed as preventing a licensee from entering into a contract with a network organization a reasonable period of time, not to exceed 30 days, in advance of the expiration date of the existing contract.

or

3-B. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which gives the network organization any rights with respect to the renewal or cancellation of such contractual arrangement not given to the licensee.

or

3-C. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization for a period longer than 2 years.

4. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which controls, restrains, limits, or in any other way interferes with the establishment of the rates to be charged by the licensee for the sale of available broadcast time to advertisers or other clients.

5. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which has the effect of or will result in the broadcasting of the programs of one network company by two or more standard broadcast stations rendering adequate primary service to the same city.

6-A. After January 1, 1942, no licensee of a standard broadcast station shall, directly or indirectly, own or be owned by, or be under common control with or have any interests in a chain or network organization; *Provided*, That the Commission will grant reasonable extensions of time in the event that the licensee is unable to meet the requirements of this restriction before its effective date.

[fol. 46]

or

6-B. No person engaged in network broadcasting shall be licensed to operate more than two clear channel stations or more than three standard broadcast stations of all classes.

or

6-C. No person engaged in network broadcasting shall be licensed to operate any standard broadcast station located

in a city receiving adequate primary service from less than five full time standard broadcast stations.

7. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, which prevents the licensee from rejecting, for reasonable cause, any program offered by the network organization. The contracts between the station licensees and network organizations shall expressly guarantee the right of program rejection by the licensee, and the judgment of such licensee shall be prima facie evidence of the reasonableness of rejection claims.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER AMENDING COMPLAINT—Filed January 28, 1942

Plaintiff having moved for an order that the complaint herein be deemed to be amended, for all purposes including plaintiff's motion for a temporary injunction and defendants' motion to dismiss the complaint or for summary judgment, in the respects set forth in the Notice of Motion dated January 5, 1942; said motion having regularly come on to be heard before this Court on January 12, 1942, at the hearing of plaintiff's motion for a temporary injunction and of defendants' motion to dismiss the complaint or for summary judgment;

Now, on reading and filing the Notice of Motion dated January 5, 1942, with proof of service thereof in support of the motion and the Court having heard John J. Burns, attorney for plaintiff, by Charles E. Hughes, Jr., of coun-
[fol. 47] sel, in support of the motion, and there being no opposition to the granting thereof if granted upon condition that defendants' motion to dismiss the complaint or for summary judgment be deemed made against the complaint as amended, and due deliberation having been had, it is

Ordered, that plaintiff's said motion be and the same hereby is granted; and that the complaint in this action be amended in the following respects:

(a) By inserting on page 5 thereof, immediately after the first sentence of paragraph Fourth, the following:

"The stations included in plaintiff's network comprise 115 standard broadcast stations which are independently owned, 7 standard broadcast stations owned and operated by plaintiff and designated and known as Stations WABC, New York, WJSV, Washington, D. C., WBBM, Chicago, KMOX, St. Louis, WCCO, Minneapolis, KNX, Los Angeles, and WBT, Charlotte, N. C.; and one standard broadcast station designated and known as WEEI, Boston, which plaintiff leases and operates."

(b) By inserting on page 7 thereof, immediately after the first sentence of paragraph Seventh, the following:

"The report was designated 'Report on Chain Broadcasting—Federal Communications Commission—Commission Order No. 37, Docket No. 5060, May 1941.'"

(c) By inserting on page 7 thereof, in the tenth line of paragraph Seventh, immediately after the words "a copy of the" the words "report and".

(d) By inserting on page 9 thereof, in paragraph Seventh, immediately after Rule 3.105 therein set forth, the following:

"3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control [2] with a network organization, [fol. 48] for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

(e) By inserting on page 10 thereof, at the conclusion of paragraph Seventh, immediately after the sentence ending

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"[2] The word 'control' as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

with the word "broadcasting" on the second line of said page, the following:

"The purpose, terms and effect of Rule 3.106 as construed by the Commission in its report (Exhibit B) are to require plaintiff to dispose of its Station WBT in Charlotte, N. C.; to raise serious doubts whether plaintiff will be permitted to continue its ownership of Stations WCCO in Minneapolis and WJSV in Washington; and to require plaintiff to dispose of its stations in any other locality where the Commission finds the existing standard broadcast stations to be so few or of such unequal desirability (in terms of coverage, power, frequency or other related matters) that competition would be substantially restrained by the licensing of plaintiff's stations."

(f) By inserting on page 14 thereof, at the end of paragraph Thirteenth, immediately after the words "Amendment V thereto", the following:

"and because it constitutes an abridgement of the freedom of speech and of the press contrary to Amendment I thereto."

and it is further

Ordered, that defendants' motion to dismiss the complaint or for summary judgment be deemed made against the complaint as so amended.

Dated, New York, N. Y. January 27th, 1942.

(Sgd.) Leonard Hand, U. S. C. J.; Henry W. Goddard, U. S. D. J.; John Bright, U. S. D. J.

[pages 49-216]

EXHIBIT B TO AMENDED COMPLAINT

[Omitted]

[fol. 221] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Upon the annexed verified Complaint and upon the Affidavits of William S. Paley and Herbert V. Akerberg, the plaintiff moves the Court as follows:

1. To convene for the purpose of hearing and determining this application and this cause, a statutory court of three judges at least one of whom shall be a circuit judge, in accordance with the provisions of Section 402 (a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C. § 402 (a)) and of the Urgent Deficiencies Appropriation Act (38 Stat. 219, 220; 28 U. S. C. § 47 (1913)).

2. To issue a temporary restraining order suspending and restraining the operation, enforcement, or execution of that portion of the order of the Federal Communications Commission dated May 2, 1941 (as amended by the order of October 11, 1941) which is specified in Paragraph Seventh of the Complaint in the above entitled action, pending the hearing upon the issuance of the temporary injunction sought hereinafter in this motion and the determination thereof.

3. To issue a temporary injunction suspending and restraining the operation, enforcement, or execution of that portion of the order of the Federal Communications Commission dated May 2, 1941 (as amended) which is specified in Paragraph Seventh of the Complaint in the above entitled action, pending the final hearing and determination of this cause.

The grounds of this motion, as more fully set forth in the annexed Complaint and in the annexed Affidavits of William S. Paley and Herbert V. Akerberg, are that:

a. The portions of the order of the Commission complained of are invalid.

b. The Commission, unless enjoined, threatens to enforce this order.

[fol. 222] c. The order and its enforcement are causing and will cause immediate and irreparable injury to the plaintiff.

d. Unless the operation and enforcement of the order be restrained pending final disposition of the action, the injury to plaintiff in the interim will be irreparable even by final judgment for plaintiff.

e. No injury will be sustained by the defendant or by the public through issuance of a temporary injunction and restraining order.

Signed: John J. Burns, Attorney for Plaintiff, Business and P. O. Address: 40 Wall Street, New York, N. Y.

NOTICE OF MOTION

To: The Federal Communications Commission
Washington, D. C.
The Attorney General of the United States
Washington, D. C.
The United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York, N. Y.

Please take notice that the undersigned will bring the above motion on for hearing before this Court on the 7th day of November 1941, at 10:00 A. M., or as soon thereafter as counsel may be heard, at Room 506 in the United States Court House, Foley Square, New York, N. Y.

Signed: John J. Burns, Attorney for Plaintiff. Business and P. O. Address: 40 Wall Street, New York, N. Y.

Dated: October 31, 1941.

[fol. 223] In United States District Court, Southern District of New York

Columbia Broadcasting System, Inc., Plaintiff,

against

The United States of America, Defendant

Affidavit of William S. Paley, President of Columbia Broadcasting System, Inc.

United States of America,
Southern District of New York,
City, County and State of New York, ss:

William S. Paley, being duly sworn, deposes and says:

1. Deponent. I am the President of Columbia Broadcasting System, Inc. (hereinafter sometimes called "CBS" or "Columbia") and I have been its President since September 26, 1928. I am fully familiar with its organization, history, and the nature of its operations, and with the history and nature of radio broadcasting and particularly of "chain" or "network" broadcasting. This affidavit is for the purpose of obtaining a temporary restraining order and temporary injunction against the enforcement of a portion of the Order of the Federal Communications Commission (hereinafter called the "Commission"), set forth in paragraph "Seventh" of the complaint herein.

2. The Plaintiff. Columbia Broadcasting System, Inc. is a corporation organized and existing under the laws of the State of New York, and is engaged in the business of network broadcasting. It has been engaged in this business continuously since January 27, 1927, when its predecessor, United Independent Broadcasters, Inc., was organized.

CBS has outstanding 1,716,277 shares of capital stock, listed and dealt in on the New York Stock Exchange and owned by over 8,000 stockholders. As appears from the balance sheet as of December 28, 1940, a copy of which is hereto annexed, marked Exhibit A, and made a part hereof, CBS has total assets in excess of $22,000,000, over $18,000,000 of which is devoted to network broadcasting, of [fol. 224] which $6,440,004.74 consists of fixed assets such as land, buildings and transmitters, and other physical assets.

In connection with the conduct of its network business, CBS operates, under license from the Commission, eight commercial broadcasting stations designated and known as WABC, New York; WJSV, Washington, D. C.; WBBM, Chicago; KMOX, St. Louis; WCCO, Minneapolis; KNX, Los Angeles; WBT, Charlotte, N. C.; and WEEI, Boston. All of these stations except WEEI, Boston, are owned by Columbia; WEEI is operated by Columbia as lessee of the property which is owned by the Boston Edison Company, Inc.

The business of network broadcasting consists of supplying programs to a number of broadcasting stations for simultaneous broadcasting. These programs are of two kinds, sustaining and commercial. Sustaining programs are programs containing no advertising which are furnished by the network to the stations at no direct cost. Commercial programs are those "sponsored" by an advertiser; for these programs the advertiser pays the network and the network in turn pays the station broadcasting the programs. Stations thus served by the network are known as its affiliates. At present the CBS network includes 123 American stations, 115 of which are independently owned affiliates, seven of which are owned by CBS, one of which CBS leases and operates, and all of which are licensed by the Commission. CBS programs are available to over 90% of the nation's entire night-time radio audience.

The operations of a network and of the stations affiliated with it are closely related and mutually dependent. A description of these operations and their interrelation is necessary to an explanation of the effect of the Rules complained of on broadcasting.

3. Physical Characteristics of Broadcasting; Role of the Federal Communications Commission. Broadcasting is accomplished by the generation, at the broadcasting station, of modulated radio waves, forming a part of the electromagnetic spectrum, which travel to receiving instruments which amplify them and translate them into audible sound waves. Radio waves vary in length and frequency. Because these waves impinge upon each other, the number of frequencies available for broadcasting is limited.

[fol. 225] The number of frequencies available for regular broadcasting (known as the standard broadcast band) is limited also because some frequencies must be kept out of

the standard band and made available for other classes of broadcast service for which there is a public need, such as international broadcast, radio telephone and telegraph service, marine, police, aviation, facsimile, amateur, experimental and other services. Moreover, the number of standard stations which can effectively broadcast without mutual interference is limited.

Because the unlimited and unregulated use of these limited facilities causes interference and confusion, and thereby prevents the public from receiving the full benefits of radio reception, Congress provided administrative machinery in the Commission, and its predecessor, the Federal Radio Commission, to apportion and license the use of these frequencies. The Commission is empowered to allocate frequencies to various classes of radio service, to license stations, to prescribe the physical type of the service to be rendered by them, and to designate their respective frequencies, power and hours of operation.

At the end of 1940 there were about 850 stations licensed by the Commission to operate as standard commercial broadcast stations, each on a designated wave length, with designated power, and for a designated time of the day.

4. Economics of Broadcasting; Need for National Networks. The American system of radio is based upon the use of the broadcasting stations for advertising purposes; i. e., the revenue of the station is derived from the broadcasting of programs on behalf of advertisers who pay for the use of the station's facilities. Advertising, as the basis for broadcasting service without cost to the listener, was not established by fiat. From among several methods of providing revenue to stations to enable them to operate and render a service to the public, the practice of selling radio time to advertisers developed as the best and most effective. The eventual success of this practice and the development of network broadcasting are the foundations of the commercial structure of radio broadcasting today.

Individual broadcast stations derive their income from commercially sponsored programs, either of network or of local origin: Network commercial programs are sponsored by advertisers whose products are widely distributed, com- [fol. 226] monly known as national advertisers. Local commercial programs are of two distinct kinds: those sponsored by local advertisers and those sponsored by national

advertisers. When a local program is sponsored by a national advertiser it is known in the radio industry as a national spot program. National spot programs always originate at the studio of the local station, and are performed there for broadcast either by live talent or, more usually, by mechanically reproducing a recorded program which is known as a transcription. National network programs, on the other hand, are performed by live talent.

In addition to commercially sponsored programs, individual stations also broadcast sustaining programs. Sustaining programs are those programs which are broadcast by the station without sponsorship by any advertiser. The sustaining programs are broadcast by the station in order that it may present a continuous series of programs, attract a larger listening audience, serve the public interest, and build the station's goodwill. The quality of sustaining programs can be improved by the individual station when its revenues from advertising increase. A prosperous station is able to build and broadcast better programs of local interest to its community.

The sale of the station's time and facilities to local advertisers is made by the sales force of the station. The sale of the station's time and facilities to national advertisers for national spot broadcasts is made by organizations known in the industry as station representatives. These representatives are generally located in the cities where national advertisers, or advertising agencies which place their advertising, have their offices. Is is the custom and practice in the industry for the station to designate such a representative as its exclusive agent for the sale of the station's time and facilities for national spot advertising. The sale of the station's time to national advertisers for network broadcasting is made by the network with which the station is affiliated by contract.

While of course broadcasting rates for both network and local programs are influenced by the popularity of its programs and competition with other media for advertisers, the charge of a station for its time varies with the station, and depends in large part upon its "coverage", or the size of its regular listening audience. Coverage by a station depends upon a variety of factors, such as the power and [fol. 227] frequency which it is authorized to use, the density of the population and ownership of radio sets within its coverage area, and the quality of its programs. Affiliation

with a network or the lack of such affiliation substantially affects the quality of the station's programs.

Of the approximately 850 commercial standard broadcast stations operating in the United States, 495 were affiliated with one of the national networks at the end of 1940. In substance, this means that these stations looked to a network to supply them with programs, both commercial and sustaining, for a portion of their time; and also that they relied upon the network for the sale of a portion of their time.

Few stations in the country could themselves produce and offer the public the full program service which the American radio audience receives today. No station could have the aggregate of creative skills represented in a great network organization such as Columbia, or the economic resources, or the talent supplies. In the first place there is a concentration of performing talent in the metropolitan centers such as New York, Chicago and Los Angeles, and the available supply of talent outside such cities is insufficient to provide a continuous flow of varied program material. In the second place, individual stations are financially unable at their own expense, to plan, develop and offer to their listening audiences expensive entertainment programs, cultural programs such as concerts of the New York Philharmonic Symphony Orchestra, educational programs such as The Columbia School of the Air, and world-wide on-the-spot news coverage of foreign and domestic events of national importance. In the third place, advertisers cannot and do not finance programs of such quality for broadcasting on single stations, since the potential audience of single stations, which to the advertiser spells potential sales, is not large enough to warrant such expenditures. The needs of the stations and the manifested desires and taste of the public led to the system of network broadcasting as a means of supplying these programs, and to the practice of affiliation by a station with a network as a means of obtaining these programs.

5. Network Broadcasting. CBS is one of the three organizations at present operating a nation-wide network system. The oldest network organization is National Broadcasting [Rel. 228] Company, Inc. (hereinafter referred to as NBC), a wholly-owned subsidiary of Radio Corporation of America which was founded and began operating in 1926. It oper-

ates two network systems, known as the "Red" and the "Blue" networks, together having 214 affiliated stations at the end of 1940. The other network organization is Mutual Broadcasting System, Inc. (hereinafter referred to as Mutual), which was established in 1934 and which is largely controlled by the Chicago Tribune, a newspaper, and R. H. Macy and Company, a department store. At the end of 1940 there were 160 stations affiliated with Mutual.

Mutual's manner of operation differs from that of CBS and NBC. Mutual has no studios, maintains no engineering department, neither owns nor maintains any facilities for the production of programs and does not originate or produce a network program service such as is maintained by CBS and NBC. It is an organization devoted mainly to the sale of the time of its affiliated stations for network broadcasting to national advertisers. Its commercial programs are produced by the originating station or by the sponsor who buys time. Its sustaining (or non-commercial) programs are selected from among those produced by affiliated stations themselves, primarily as a part of the sustaining service of the stations for their own local listening audiences.

Network or "chain" broadcasting is defined by the Communications Act of 1934 as the "simultaneous broadcasting of an identical program by two or more stations". The business of operating a nation-wide network consists of supplying such programs of a general and national interest to a large number of radio stations. This is accomplished technically by transmitting the program over wires from a point of origination to each of the stations on the network. Programs are frequently picked up from a number of places in various parts of the world, brought to the central origination point of the network and thence transmitted to the stations. To conduct its business, the network sells the time of its affiliated stations to national advertisers. It contracts to obtain for the advertiser the use of the broadcasting facilities of such of the affiliates as he may select to broadcast the programs.

The normal operation of a national network includes the offering of a continuous flow of programs for a period of [fol. 229] from 16 to 18 hours a day throughout the week. In extraordinary times, during crises in domestic or international affairs, it is not unusual for networks to remain on

the air for 24 hours a day in order to be in a position to report events as they occur.

The wires over which the programs are transmitted to the stations are telephone wires of special quality furnished by the American Telephone & Telegraph Company. CBS contracts for program transmission service over wires of this quality for minimum of 16 hours per day at a cost of over $2,000,000 a year. Thus physical connections are maintained constantly between the network and the affiliated stations.

The network thus performs three major functions: the production of programs for its affiliates to broadcast, the distribution of these programs to its affiliates, and the sale of the time of its affiliates to advertisers.

Network Plant Investments and Program Expenditures

The property and financial resources required for such network operations are substantial. CBS now has (a) in its main office building at 485 Madison Avenue, New York City 12 studios and 128,000 square feet of office space spread over 21 floors of a twenty-four story building, (b) a recently completed special studio building on 52nd Street between Madison and Park Avenues in which are situated 8 additional studios, and (c) several theatres and assembly halls in other parts of New York City. In 1937 CBS completed the construction of outstandingly modern studios and accompanying office space in Los Angeles where there are 10 studios and 14,000 square feet of office space employed in network broadcasting. Similarly in Chicago and in Washington, D. C., where a large number of network programs originate, there are ample studio facilities representing substantial investments. Incidental to the operation of its local stations in St. Louis, Minneapolis, Charlotte and Boston, CBS also maintains studio facilities which are to a lesser degree utilized also as orginating points for network programs.

Because of the necessity of supplying a continuous flow of programs for 365 days a year, CBS has expended large sums of money in order to assure a steady supply of program material of the highest quality. Such expenditures [fol. 230] are essential if CBS is to conform to the standards of American network broadcasting which CBS itself has had a major part in developing. To assure the continu-

ance, for instance, of such an outstanding feature as the Sunday afternoon broadcasts of the New York Philharmonic Symphony Orchestra, it enters into a contract with that organization for a period of five years at $75,000 a year. To assure the coverage of world-wide news, it has employed and placed in numerous strategic points abroad news reporters and commentators of outstanding ability to make their observations and reports constantly available to CBS and its affiliated stations. Through its arrangements for continuous wire transmission service to the stations regularly affiliated with it, CBS is enabled on short notice to make it possible for the voice of the President of the United States, of United States senators and congressmen, of cabinet members, of spokesmen for the various political parties, and other speakers with messages important in the administration of government, to reach into the homes of more than 90% of the radio audience. In 1940 alone, CBS expended in excess of $5,000,000 on sustaining programs. By long term contracts for real estate, news services, special programs, and musicians, CBS stands committed to future payments in excess of $4,000,000. Moreover, CBS now reserves about 15 hours each week from sale, in order to present a wide variety of public service programs and other programs devoted to the development of new and improved ideas and techniques of broadcasting, in fields ranging from adult education to popular entertainment. These 15 hours reserved for special purposes by no means represent the total time devoted to sustaining programs.

CBS has taken the leadership in developing program standards which have raised the level of both sustaining and commercial programs. These standards have been enforced by CBS and have been continually improved practically since the beginning of network broadcasting. They were formalized in a statement which CBS published early in 1935 and have been enforced and amplified ever since. Because of its strict adherence to such high program standards CBS has refused over $6,000,000 of network business tendered to it in a period of four years. A copy of the statement of standards to which commercial programs on the CBS network are required to conform is hereto annexed, marked Exhibit B, and made a part hereof.

[fol. 231] 6. Assurance of National Circulation. Network broadcasting depends upon the use of networks as a med-

ium of advertising. To be useful to the national advertiser, the network must be able to provide him with an assurance of a nation-wide audience comparable to the assurance of nation-wide circulation provided by the visual media (magazines and other printed publications) having a national distribution. In order to create a national circulation for network programs, a network organization must make exhaustive surveys of the listening patterns for the individual stations affiliated with the network. The determination of network program circulation is itself complex beyond any comparison with that of printed publications. National circulation for radio programs can be guaranteed only when outlets are fitted together like a jigsaw picture, so that there are no interstices or "blind spots" between neighboring affiliated stations. Although the advertiser wishes to purchase a national circulation, he does not wish to spend money for superfluous outlets. It does not satisfy an advertiser to know that an outlet's signal is audible in a particular market—he wants to know that the outlet has a satisfactory audience there. Surveys of listening patterns made by Columbia from time to time, showing what outlets are preferred by listeners in particular areas, establish that Columbia's network programs are heard in the case of each outlet by an audience which is built up slowly but progressively over substantial periods of time. Columbia uses these surveys as a guide to perfecting the jigsaw picture of national network coverage, and particularly to determine which outlet is needed in a given area to serve the advertiser without uneconomic overlapping of coverage. If the makeup of Columbia's network were to lose its stability through the sudden advent and departure of affiliated stations, listening patterns would fluctuate wildly, and the circulation which today results from the constant performance together of scientifically chosen outlets would not exist. What circulation would be produced if the outlets of a network were in continual flux might not be measurable and the advertiser would be reluctant and very likely even unwilling to buy the immeasurable.

Definite assurance of a substantially nation-wide audience, fitting their own distribution and sales objectives, provides the incentive for advertisers to finance the production of the costly programs which the radio audience enjoys. [fol. 232] It will be seen that this definite assurance requires both that broadcasting stations be available to the network

when the network approaches the advertiser, and that the same broadcasting stations still be available when the advertiser finally selects a program period. Nor will the advertiser embark upon the costly venture of a nation-wide radio program series unless the relations between the network he selects and its affiliated stations are sufficiently stable so that he may reasonably expect to maintain his coverage and enjoy the cumulative fruits of his efforts to please the listening public and promote sales of his product.

This stability, fundamental to the practical existence of network broadcasting, has been achieved by the practice of the network and the station entering into a contract, known in the industry as an affiliation contract, pursuant to which the station becomes the network outlet in the station's service area. The provisions of the contract hereinafter described are indispensable to effective network broadcasting and to the fullest use of the radio facilities of the country.

The Affiliation Contract

Columbia's affiliation contracts are, in most cases, in the form shown in Exhibit "A", annexed to the complaint. The material provisions are substantially as follows:

(a) Columbia agrees to furnish to the station an average of at least 60 hours per week of network sustaining and sponsored programs.

(b) Columbia will furnish all available network sustaining programs without charge. It will furnish to the station all commercial programs which the sponsor requests the station to broadcast. In turn, the station will be paid a specified hourly rate for the use of its facilities in broadcasting network commercial programs. Usually this hourly rate paid to the station is graduated upward as specified totals of network commercial hours are successively attained by the station.

(c) The station will not broadcast programs from any other network, except that it may join occasional local, state, or regional hook-ups to broadcast special events of public importance.

(d) Columbia will not furnish its programs to any other standard broadcast station in the city in which the station is located, except in case of public emergency.

[fol. 233] (e) The station will, upon not less than 28 days' notice from Columbia, broadcast the commercial programs furnished to it by Columbia, provided that:

(1) The station need not broadcast such programs for more than 30 "converted hours" in any one week. A Converted hour is one night-time hour or two daytime hours.

(2) The station may substitute its own sustaining programs devoted to education, public service, or events of public interest, and

(3) The station may reject any network commercial program which it deems not in the public interest.

(f) The station is free to, but is not required to broadcast the network sustaining programs.

(g) The contracts are usually for a term of 5 years with Columbia having the right, in some instances, to terminate on 12 months' notice.

The foregoing contractual provisions embody the essential practices on which the structure of network broadcasting has been built. Preeminent among them are the network's call on the time of its affiliates (item (e) above) and the mutual exclusivity of affiliation (items (c) and (d) above). The importance to the industry of stability in network outlets, to compete with magazines and other publications for national advertising, has already been stated.

Contribution of Networks to American Broadcasting

Network broadcasting has been an important factor in the development of the broadcasting industry. Many improvements in engineering, in program quality, in the broadcasting of special events of national interest to larger audiences, and in the general character and ethics of the business, have been due to the network method of broadcasting. Network broadcasting made possible a wider reception than could have been obtained in any other way for expensive entertainment and cultural programs. Networks have taken the leadership in the development of programs and program standards, particularly in the matter of new program content in the fields of culture, education, news, and public debate. Network affiliation has been of great

[fol. 234] financial advantage to the affiliated stations. The advertiser and the listening public have expressed a decided preference for network as against local broadcasting.

During the entire period in which the standard affiliation practices have been usual and customary in the industry, broadcasting in America has grown remarkably both quantitatively and qualitatively. Its use as an advertising medium has flourished and both networks and network affiliates, as well as many unaffiliated stations, have found themselves on a sound economic basis.

During this period the revenues of affiliated stations, and their share of the revenue from network broadcasting, have increased substantially. The quality of radio programs, both local and network, has substantially improved both in content and variety. Networks and stations have expanded their coverage of the country and the size of the radio audience and the amount of listening have increased, while the cost per listener to advertisers for the use of the CBS network facilities has decreased. This growth of the use of the radio facilities of the nation could not have been accomplished without the practices of exclusivity and the call on time.

The Commission and its predecessor have, at all times been aware of these practices, and of the provisions of the contracts concerning them. The licenses of all stations having such contracts with CBS have been renewed by the Commission and its predecessor semi-annually during this period, until August 1, 1939, since which time the licenses have been renewed annually. Since 1934 contracts between networks and affiliated stations have been filed by stations with the Commission and considered in connection with applications for renewal of their licenses, requests for increases in power and for new assignment of frequencies. Prior to the report of the Committee referred to below, these provisions to my knowledge have never been criticized or questioned by the Commission or its predecessor in any decision, order, release or any other public statement.

CBS, relying upon the validity and subsisting effect of these practices and agreements, has devoted over $18,000,000 of assets to network broadcasting. Neither the Commission nor its predecessor has ever claimed heretofore the power to regulate the contractual relationships between networks and their affiliated stations.

[fol. 235] 7. The Chain Broadcasting Investigation, Eventually Culminating in the Amended Order of October 1941. On March 18, 1938 the Commission, acting on its own motion and not upon a complaint or petition, adopted an order directing an inquiry by the Commission into "the contractual relationships between chain companies and network stations", and divers others matters. A Committee of three members of the Commission was appointed, and opened hearings in the fall of 1938, at which testimony was taken and exhibits were submitted. In June 1940, approximately one year after hearings closed, the Committee submitted a lengthy report to the Commission. The networks were heard orally and by brief, and in May 1941 a majority of the Commission rendered a printed Report accompanied by an Order containing eight Rules.

After the Commission issued its Report of May 1941, United States Senator Wallace H. White of Maine introduced a resolution to authorize a Senate Commit-ee to investigate the jurisdiction of the Commission to make its Order, and the reasonableness and effect of its Rules. Between June 2 and June 20, 1941 the Senate Committee on Interstate Commerce took the testimony of Chairman James Lawrence Fly of the Commission, and of representatives of all national networks and others, on the question whether Senator White's resolution should be adopted. I shall refer to the printed minutes of these hearings (U. S. Government Printing Office, Washington 1941, 628 pp.) as the "White Committee Hearing".

The Senate Committee adjourned subject to the call of its Chairman. Subsequently counsel for the Commission and its Chairman conferred with representatives of Columbia (which expressly did not waive its objections to the Commission's claim of power) and others. These conferences were without result. On August 14, 1941 Mutual petitioned the Commission to lift the prohibition against exclusive network option time by amending Rule 3.104. Upon this petition the Commission called for briefs and oral argument, but no further testimony, from interested parties, and invited them to discuss all the Rules incorporated in the Report of May 1941. Columbia and the other national networks filed briefs and made oral arguments to the Commission on September 12, 1941. Thereafter, on October 11, 1941, the majority of the Commission issued its Opinion on Rehearing, accompanied by an Order

[fol. 236] amending the Order of May and changing three of the Rules. The said Opinion On Rehearing and Order, and the dissenting opinion of Commissioners Case and Craven are attached as Exhibit "C" to the verified complaint.

That the approach of the Commission majority to the problems in the broadcasting industry was essentially one of academic unreality is evident from the central thesis pursued in the Report of May. This thesis is monopoly by Columbia and NBC. It may best be examined by turning to the Commission's conception of monopoly.

8. The Commission's Conception of "Monopoly"; Competition In "The Network-Station Market". The existing national networks are constantly engaged in vigorous competition for advertising sponsorship of commercial programs, for listeners who will build the goodwill of their outlets, and particularly for the best outlets in all the desirable markets. Every outlet which is affiliated with Columbia today has been free to change its affiliation upon at least one occasion since the formation of Mutual. There is a substantial turnover in the constituency of each national network. Every network makes overtures to stations under contract to competing networks to induce such stations to switch affiliations when their existing contracts expire.

The jurisdictional basis of the entire Commission Order as to chain broadcasting rests, I am informed by counsel and believe, upon the narrow and delicate stem of a single conclusion of fact—the Commission's own conclusion that the public would be better served by radio if existing affiliation practices were to be suppressed, thereby creating a new area of competition in what the Commission calls "the network-station" market.

At page 48 of its Report the Commission asserts:

"NBC and CBS contend that the networks compete, and compete vigorously. Certainly there is a considerable degree of competition among networks for advertisers and for listening audiences; but this does not mitigate the restraints found with respect to network-station relationships. In the radio broadcasting field, three different markets must be distinguished—the market in which networks and stations meet advertisers, the market in which net-

[fol. 237] works and stations meet listeners, and the intermediate or internal market where stations meet networks. It is in this intermediate network-station market that current practices have most directly restrained competition; no considerations of the extent to which the networks may compete for advertisers or listeners can conceal the extent to which they do not compete in the network-station market.

"The restraints which we here consider have not been achieved in either of the two more common ways—through coalescence of the networks or through coalescence of the stations. Rather, they have been achieved through coalescence of some stations with one network and other stations with another. But the result is nonetheless to destroy the free market and to substitute for interplay of competitive forces a sort of monolithic rigidity. Stations bound by the usual 5-year exclusive contracts are not free to bargain with other networks for programs; networks are not free to bargain with those stations for time; and the door is closed against new networks. The result is to restrict the flow of programs from producers to listeners."

Columbia's studies show that the flow of programs to listeners is steadiest when the identity of the outlet carrying the programs has become established. A change of outlets carrying a Columbia program upsets the listening patterns for that program, and it takes substantial periods of time before the listening patterns re-form around the new outlet.

This "network-station market" which the Commission is trying to create is not the familiar network-station market in which networks compete for contract affiliates. Instead, it is a market in which the networks would be in competition anew every time they sought outlets for a network program; where networks would engage in a sort of *over-the-counter, per program competition.* It is an abnormal market in which networks would compete, not for regular affiliates to carry all the network's programs, but for occasional outlets to carry particular programs. The Commission makes entirely clear that by "the network-station market" it means a market where networks compete not merely for contract affiliates but for outlets *on a per program basis.* Thus the Commission complains, in the excerpt quoted above that: "Stations

[fol. 238] bound by the usual 5-year exclusive contracts are not free to bargain with other networks *for programs;* [other] networks are not free to bargain with those stations for time;" and so a station which contracts with one network does not have constant access to the programs of every other network. At no time has the Commission been able to show that in creating this artificial market it is not, in obedience to a theory of its own, forcing the established major networks to cease being what they are today and to become something the precise nature of which no one can wholly foresee.

Again, by its October Opinion On Rehearing the Commission reiterates its desire, as stated in the Report of May, to create a new form of competition among networks on the basis of individual periods of the time of outlets. It says (Exhibit "C" to verified Complaint, p. 11):

"An exclusive option effectively removes a station from the station-network market with respect to all the time it covers. The Commission believes that such a serious restraint upon competition is inconsistent with the freely competitive system contemplated by Congress in the Communications Act of 1934. An exclusive option, to the extent that it encompasses the most valuable broadcast hours, approaches the effectiveness of the exclusivity clauses in affiliation contracts in denying other networks access to a station, and is therefore objectionable for many of the reasons given in the Report for the elimination of exclusive affiliation. Nor is the fact that a given network has utilized a particular period of time over a station any real justification for placing that time under exclusive option. The network which has a contract for a commercial program with a sponsor and which has been sending that program to a number of its affiliated stations throughout a season already has an almost insuperable advantage in selling that program for another year; for commercial program series are frequently renewed year after year. To permit such a network to have an exclusive option over its affiliated stations on the periods used for commercial network programs *would effectively destroy the possibility of competition for those periods.*" (Italics added.)

In the October Opinion on Rehearing the Commission once more criticizes exclusive option time because it "re-

[fol. 239] stricted *competition in network programs.*" (Italics added.)

This represent a brand new theory of competition for network programs such as never existed in the broadcasting industry. In the period before NBC adopted a formal affiliation contract, the outlet stations of NBC did not flit from network to network for their national network programs. There was never any such "network-station market" as the Commission has now visualized.

Solid reasons explain why economic forces operating in the real world of the radio industry have not produced any such market. National advertisers would not make use of the radio medium if it did not present a workable means of reaching a nation-wide audience. The instability attendant upon any over-the-counter market for network programs would remove that assurance of an orderly and well-defined national circulation which is fundamental to the existence of network broadcasting.

Under the present arrangement between Columbia and its affiliates, Columbia assumes the major risks incident to the relationship. Columbia already bears the risk of fluctuations in network commercial business by obligating itself unconditionally to deliver 60 hours of program service per week. Under its contract with affiliates Columbia is obligated to furnish a sustaining program service and in most cases to pay the cost of wire connections with the stations. This obligation must be discharged whether or not Columbia is able to sell to network advertisers the time of its affiliates. This obligation is particularly onerous in periods of economic decline for the radio business. Whatever the relation of commercial program volume to total network service, the 60-hour guaranty of service must be met, and so the cost of sustaining service must advance proportionately as the volume of commercial programs recedes.

9. The Commission's Order Puts An End to Affiliation Practices Essential to the Existence of Network Broadcasting. Taking the Commission's Order of May 2, 1941 and the amended Order of October 11, 1941 together, the Order promulgates eight Rules, five of which are questioned in this action. The Rules not questioned in this action do not subject Columbia to any present injury. The Rules attacked here restrict the right of stations to enter into affiliation contracts with CBS containing the provisions

[fol. 240] referred to in paragraph Fifth of the complaint, and in section "6" of this affidavit (page 11 hereof).

The effect of the challenged Rules will be to destroy efficient network broadcasting, reduce the number and quality of nation-wide programs, and make the country's largest and most powerful stations even more dominant at the economic expense of the smaller stations. Instead of carrying out the professed objective of the Commission, namely, the fullest and most effective use of the radio facilities of the nation, the Order will in fact impair and restrict their use, contrary to the public interest.

The Interdict Against Exclusivity

Rule 3.101 prohibits a station from entering into an agreement with CBS pursuant to which the station agrees that it will not accept network programs from any network except CBS. *Rule 3.102* prohibits a station from entering into an agreement with CBS to obtain CBS's exclusive services within the listening area of the station. These Rules prohibit mutual exclusivity of affiliation between Columbia and its outlet stations. These Rules may well result in breaking up CBS as well as other national networks, and certainly will cause a contraction in the number of network programs, and a lowering in their quality and standards.

Rule 3.102 as amended in October forbids mutual exclusivity and then provides:

"This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."

Only one station in each area could be given "the first call" upon Columbia's network programs; but the consideration flowing to Columbia for making that one station Columbia's outlet is today the ability to help that station build an audience and to sell that station's time for network commercial programs. *Rule 3.104*, as will be seen, destroys Columbia's opportunity to benefit by the bargain.

This one-way street apparently was devised by the Commission after it had found that under the Rules as promulgated it was impossible to meet the objection that, with no two-sided affiliation arrangement between network and

[fol. 241] stations, the best programs would gravitate to the most powerful stations and the weaker stations would be impoverished. But the Commission obviously expects established networks to grant this one-way option without any quid pro quo, while an unseemly reward is created for the mere adventurer in radio. Any irresponsible newcomer to the network field is left free to pick the choicest stations on all networks, while organizations with standards and character, having sizeable commitments, are asked to bind themselves to outlets often not the most desirable. This wholly artificial arrangement can only usher in twilight for the present network system.

The interdict against territorial exclusivity strikes directly at the stations. The majority of the more desirable Columbia affiliates have made their network affiliation a part of their identification to the public—to listeners through station announcements on network and non-network programs alike, to the commercial world by styling themselves *the* Columbia outlet in the territory upon their letterheads and in their industry advertising.

The covenant of the affiliated station to the network that the station will not, during the term of the affiliation contract, accept programs from a competing network provides an incentive for CBS to promote sale of the station's time to national advertisers, and protects CBS against the possibility that a competing network will be the beneficiary of the investment made by CBS in such promotion. It also provides the incentive for CBS to produce good sustaining features, to develop an audience for the station which will be of continuing interest to national advertisers. Exclusivity of affiliation permits the station to advertise itself as the CBS outlet in its area, and thus to take advantage of the national prestige of an established network.

The network advertiser wants the biggest continuous nation-wide audience he can obtain, at a reasonable price and with the assurance that he can retain it so long as his programs are popular. It is just this assurance which exclusivity tends to create.

Under the Commission's Rules the networks would have taken from them the opportunity and inducement to build circulation for themselves and their affiliates on a permanent basis. The Rules place the networks in the position that a newspaper or a magazine would be in if it could [fol. 242] build circulation only to share that circulation

with competitors, and if it had no certain stake in its own ingenuity, enterprise and character building.

The Prohibition Against Exclusive Options

Rule 3.104 contained in the order of May 2, 1941 prohibited the station from granting the network an exclusive option upon a certain portion of the station's time. It read:

"3.104. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time."

By the order of October 11, 1941 this Rule was amended to read:

"3.104. No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a.m. to 1 p.m.; 1 p.m. to 6 p.m.; 6 p.m. to 11 p.m.; 11 p.m. to 8 a.m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."

Rule 3.104 as amended continues the absolute prohibition against the giving by stations of exclusive options to networks, but provides that an "option", not exclusive against other network organizations, may be given by a station to national or regional networks (all the Rules are made applicable to regional networks as well) for the broadcasting of network programs during not more than three hours in each of the four segments into which the broadcast day is divided. The Order defines an "option" as

[fol. 243] "any contract, arrangement, or understanding, express or implied, between a station and a network organi-

zation which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time."

When a network's option upon the time of a station ceases to be "exclusive as against other network organizations", it ceases to be an option. It becomes a mere opportunity for the network to offer a program or program series to the stations and try to conclude a contract with enough stations in important markets to satisfy the advertiser. The Commission's October Opinion On Rehearing relates:

"The Commission is not convinced by the contention of NBC and CBS that the optioning of time by networks is indispensable to network operations, particularly since the chain broadcasting regulations, neither in their original form nor as herein amended, place any restrictions on the bona fide purchase of station time by networks. Networks have heretofore successfully operated without option time. However, it is clear that some optioning of time by networks in order to clear the same period of time over a number of stations for network programs will operate as a business convenience."

This "non-exclusive option" will not enable networks "to clear the same period of time over a number of stations for network programs". If Columbia's "option" during the period from 8 to 10 p.m. on a Tuesday evening means that the time of the outlets is available for Columbia's sponsor *provided* that five other network organizations (national and regional) do not make the station contracts first, then Columbia must contract with its sponsor subject to a sheer gamble that the time can be cleared and the advertising contract performed.

The prohibition of exclusive option time will make the clearing of time for the arrangement of a national network program an almost impossible task. Advertisers do not determine to use network broadcasting to sell their products only 24 hours prior to the time of the program. It sometimes takes months of planning, market study and research, [fol. 244] program planning and negotiations before an advertiser decides whether or not to use network broadcasting and thereafter what stations and programs to utilize. The

national advertiser must have nation-wide coverage, both because he sells nationally and because he must give substantially the same support to the distributor and the retailer in all parts of his territory. Advertising efforts must be carefully and scientifically planned. Frequently they are related to an advertiser's whole manufacturing and merchandising operations as much as a year in advance. Under such circumstances it is practically impossible to sell an advertiser the use of networks, a program idea, program talent and the like, when the network is not able to know and inform the advertiser in advance, what stations and what time the network has to offer; in short, what circulation he could get for the money he would spend. Under the Rule in question, the network might spend months of effort in convincing the sponsor, in helping him select the territory in which to broadcast his program, the stations to utilize, the character of the program, and the talent, and then find itself unable to provide either the stations or the time desired by the advertiser in the markets which he desires to cover.

It would be impossible in practice to operate a network such as that of CBS if CBS did not know in advance what circulation it could deliver, what stations it had to offer and what time on those stations was available for use by prospective advertisers. This is precisely the kind of assurance the visual media are able to provide and the kind of assurance which the advertiser requires before he is able to make any intelligent selection of his medium, before he does, in fact, select his medium.

Notice to Affiliates of Network Commercial Commitments

Existing contracts provide that the affiliate may require not less than 28 days' notice from the network before the affiliate will be called upon to broadcast a network commercial program. Amended *Rule 3.104* provides that the period of notice shall be increased to 56 days, and the Commission explains (Exhibit "C" to verified complaint, p. 8):

"This lengthening of the call period will give stations greater freedom in scheduling local and non-network na- [fol. 245] tional programs during the hours of the broadcast day which are subject to network option: for such programs, even though subject to be moved, may be assured

of at least eight weeks of continuous broadcasting. Nor does it seem that the increase in the call period will seriously affect national network business; for the national networks have pointed out that theirs is a long-range business and that large-scale national advertising network programs are usually planned and arranged for many months and even a year or two ahead of the actual commencement of the broadcasts. Under such circumstances, it does not appear that a 56-day call period will impose any serious hardship upon national network operations."

In the foregoing the Commission strikes a needless blow at the flexibility of the highly competitive network advertising business. I have already pointed out the frequent need for the ability to negotiate with advertisers well in advance with the assurance of being able to deliver if we make a sale. On the other hand, a variety of reasons in the industrial world will cause advertisers to desire to start an advertising campaign swiftly. Newspapers and magazines will continue to be able to accommodate such advertisers, whereas network broadcasting will be working under an unnecessary handicap which will weaken it in competition with other media and cause it to lose important business.

Minimum Network Service and Sustaining Programs

Of course under the Rules the network cannot agree, as it does now, to supply a minimum number of hours per week of network sustaining and sponsored programs, at a time when all certainty as to the outlets for network commercial programs is destroyed.

The sustaining program service provisions of the present contracts will go out because existing incentives for the production of sustaining programs will cease.

The inevitable result will be the decline of the networks as producers and suppliers of programs which the stations now receiving such programs are unable to provide for themselves. Thus networks are relegated principally to the role of time brokers, agencies for the sale to network advertisers of the time of such stations as will engage them to make such sales. It will enable anyone, without the necessity of having a network organization geared to [fol. 246] the production of network programs of quality, to buy wire connections and sell the time of whatever stations he can obtain, for any specific commercial programs.

Not being subject to the expense of operating an organization for the building of programs, with the investment which that entails, such agencies will be in a position to cut the rates to the advertiser, or to give to the station a greater share of the network revenue. Indeed it would be perfectly possible for such an organization both to cut the rates to the advertiser and to give the station a greater share of the revenue, as a result of operating without the trained personnel, the elaborate organization, the talent commitments, and all the other investments and expenses, which make possible the operation of a major network like CBS. The result of the Commission's Order will be to encourage irresponsible fly-by-night operations on a get-rich-quick basis and to prejudice the permanent and stable network system which now obtains.

Unlike Columbia, Mutual has no studios, maintains no engineering department and does not produce programs, except European news broadcasts. It is thus relieved of the expense incidental to such operations and to which CBS is now subject. Mutual is in a position, once these Rules take effect, to charge less than CBS or NBC for obtaining the use of the facilities of the same stations which CBS or NBC would be in a position to offer.

Moreover, unless the networks can be forced to adopt the one-way options to which I have adverted, these Rules will result in the best programs gravitating to the most powerful stations in each community. The lower powered and smaller stations will not then get the program service they now receive from their exclusive affiliation with one of the networks. The smaller stations, deprived of some of the better programs, will receive whatever programs cannot find a place on the larger stations; they will, therefore, encounter shrinking audiences, decrease in their revenue and the inevitable contraction in their public service. It should be emphasized that under the existing contractual arrangements Columbia has been able to maintain many of the less desirable stations as constituent parts of its network to the great benefit of these stations and their audiences. Such stations have been able to gain and hold substantial and often predominant audiences in their communities by virtue of Columbia's commercial and sustain-
[fol. 247] ing services. Extension of its network services to such stations has been profitable to Columbia so long as a common bond has existed between Columbia and the sta-

tions. This is the bond which the Commission is arbitrarily severing now.

With the loss of exclusive affiliation and of option time, the networks will be put in the position of being desperately compelled to maintain sales at all costs and therefore will not dare to enforce their present policies and practices or high program standards. Moreover, there must then be an end to the practice of withholding network time from sale in order to devote it to public purposes. Once the existing affiliate relationship is destroyed, networks will have "affiliates" only on a commercial basis, that is, only when and to the extent that the time of certain station can be sold and cleared for commercial programs. In such circumstances it is difficult to see how network public service programs can ever be scheduled on a sustaining basis.

CBS is budgeting $500,000 a year for the operation of a Latin-American network. It is developing television at an annual expenditure of $800,000 a year. It is expending approximately $500,000 a year to cover every phase of the European war and the concurrent developments in America in relation to it. It derives absolutely no income whatever from the Latin-American network or television, and does not expect to derive any material income from these services for some time to come. A contraction in network income from the breakdown of the principle of exclusive affiliation and option time must certainly result in a contraction of these services which are today financed from current operations.

The Two-Year Limitation Upon Contracts

The duration of affiliation contracts, now usually five years, is fixed by *Rule 3.103* at two years.

As a matter of business necessity, the relationship between the network and the station must be of substantial duration if the network is to carry out its functions effectively. Since one of the principal functions of the network is that of making the facilites of stations available to the advertiser it is essential that it be assured that the facilities to be offered to prospective users be available for a substantial length of time. The printed national advertising media [fol. 248] have permanent assurance of the availability of advertising facilities. If networks are to compete on an equal basis with these media, they cannot be subject to the disadvantage of not being assured of facilities.

The network would not have been justified in making the substantial capital investment and large expenditures currently necessary for effective network operation, if it could not be assured of the availability of outlets for a substantial length of time. As the business is conducted today, long-term contracts and investments must be made to provide offices, studios, studio and technical facilities, et cetera. Moreover, not a single compensating advantage to the public would result from a short-term restriction.

Investments of the kind which an outlet must make cannot be justified on a temporary basis. The licensee of a station is able and willing, and usually eager, to make these long-term engagements because he has a reasonable expectation that his license will be renewed continuously. Station licenses have been regularly renewed by the Commission and its predecessor, the percentage of denials of renewals having been only a small fraction of one per cent of renewal applications. The rights of the public are adequately safeguarded by the present practice.

The Commission explains that in October it

"concludes that a two-year affiliation contract will permit a reasonable measure of stability in network-station relationships without at the same time seriously interfering with competition in the network-station market. Of course, what precise limit on the duration of affiliation contracts is most desirable is a matter of judgment. A two-year affiliation contract represents a substantial diminution from the five-year term currently being utilized by NBC and CBS, and may be expected to remove that restraint upon competition and give freer play to competitive factors by making possible readjustments between stations and networks on a biennial basis."

But if networks are to engage in free-for-all competition on a per-program basis, with the first network which sells a particular period having the station as its outlet for that period, then affiliation has lost all its meaning and the contract period could as well have a twenty-year duration as a two-year one.

[fol. 249] Right of Stations to Reject Network Programs

Rule 3.105 prohibits the station from making any contract with a network which prevents the station from rejecting network programs which the station reasonably believes

to be unsatisfactory or unsuitable; or which prevents the station from rejecting a program already contracted for which, in the opinion of the station, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

If it is intended by this Rule to secure stations in their right to substitute sustaining programs of outstanding local or national importance for a network program, there can be no complaint concerning it. The CBS affiliation contract annexed to the complaint contains a provision which preserves this right. If, however, as its wording suggests, this Rule proposes to enable stations to reject network commercial programs which they have already agreed to accept, simply because the station prefers another commercial program, the Rule will discourage the use of networks by advertisers. Networks and sponsors incur substantial expenditures for wire transmission, studios, talent and the like. They are entitled to know that a station which has agreed to accept a program will not reject it in favor of the program of some other sponsor, justifying its breach of faith by invoking a Rule of the Commission. Under such circumstances sponsors would not contract for network time. Hence, this Rule will discourage the use of networks by advertisers.

Summary

The combined effect of the Rules complained of would be to destroy the present structure of network broadcasting. Burdens will be imposed upon that structure which will render it less able to meet the needs of the advertiser. A decline in the ability to meet the advertisers' needs will man a decline in the use of network broadcasting by advertisers and in consequence a reduction in the revenues. The result of this will be less program service, then fewer listeners, and so begins a descending spiral in revenues, rendering the stations less able to serve the public interest. The inevitable result of the Rules must therefore be to impair the full, effective and best use of the radio facilities of the country.

[fol. 250] Moreover, the Rules will compel CBS to alter fundamentally the structure and character of its business. In its present method of operation, CBS delivers sustaining programs to the station without direct charge for programs and in most instances without charge for telephone wires

to deliver them, and it shares the revenue from commercial programs with the station. CBS is compensated for the costs of producing its sustaining program service, and the cost of the wires necessary to deliver that service, by having the station as an exclusive affiliate, by having an option upon its time for network sales, and by its share of the revenue from network broadcasting. Under the Rules, the service provided to the station by CBS can no longer bring these compensations.

Finally, the broadcasting business is being thrown into confusion and uncertainty by the effect of the Rules upon advertisers, stations and networks. Some advertisers are uncertain and disturbed by the inability of the networks to assure availability of outlets. For this reason they are considering the diversion of their advertising expenditures to other media. Confusion and complications are attendant upon the wire arrangements to be made for program distribution under the Rules. The cost of permanent wire connections to all stations by any single network is prohibitive. There is no way of telling to which stations CBS should obtain permanent wire connections; the number and the cost of temporary wire connections cannot be determined.

There is confusion and uncertainty as to which stations will be connected by wire to which networks for purposes of national defense and national emergency. CBS has been unable to determine how and under what conditions sustaining programs will be delivered and to which stations. The Commission itself is unable to determine how networks will operate under the Rules as promulgated.

Networks are today the greatest and most expeditious means of mass dissemination of news, information and public discussion. They are peculiarly a vital factor of national defense in the present emergency. The inevitable uncertainty, chaos and confusion which the Rules will cause is contrary to the public interest.

10. Irreparable Injury. The Rules impair Columbia's freedom and ability to enter into the affiliation contracts [fol. 251] described in the complaint and in this affidavit. Chairman Fly has stated that any station which had such a contract after the effective date of the Rules would lose its license. As to existing contracts the Rules are to take effect November 15, 1941. In all other respects the Rules became effective May 2, 1941.

Breaches of Affiliation Contracts

Some stations having such contracts with CBS are refusing to renew them; some stations having such contracts are threatening to cancel or repudiate them and some stations have already cancelled or repudiated such contracts, on the ground that the Rules prohibit them. The stations are refusing to renew such contracts because of the drastic penalty for entering into contracts in violation of the Rules, in the event they are held to be valid.

Interference With Business Relations

Columbia is required to contract for adequate space, technical equipment and program material in advance in order to carry on its normal course of business. Because of the uncertainty as to whether it will obtain relief from these Rules, Columbia is now unable to contract and arrange for such program material, technical facilities and the like. The Commission's Order has already made advertisers doubtful of the continuance of network service, of the availability of network facilities and of the performance of the existing network facilities contracts. This situation seriously jeopardizes Columbia's revenues, the orderly conduct of its business, and its ability to continue its present program policy and service.

Need for Interim Relief

Immediate injunctive relief is necessary to protect Columbia's business from disruption. A final adjudication, after a full fearing by this Court, that the Rules are invalid would, in the absence of interim protection, leave the plaintiff irreparably injured. Affiliated stations have already taken action jeopardizing Columbia's business and the continuity of its services, and advertisers have already indicated serious doubt as to the continuance of their present arrangements. Graver jeopardy is imminent. Not later [fol. 252] than the date when the Rules become applicable to existing contractual relations, existing values will be destroyed beyond repair.

Listeners will be lost and advertisers will be diverted to other media and in result the plaintiff will lose its goodwill, built up through its having furnished a regular, uninterrupted service for many years. Unless temporary relief maintaining the status quo until a determination of the validity of the Rules be granted, plaintiff's final relief

in this action will be futile. Since the industry has functioned with public approval for over fourteen years, and since no interest is harmed by its present operations, no injury will result from suspending the Rules until final disposition of this case.

William S. Paley.

Subscribed and sworn to before me this 30th day of October, 1941. Margaret E. Landry, Notary Public, Westchester County. Certificate Filed in N. Y. Co. Clk's No. 940, Reg. No. 2 L 573. Term Expires March 30, 1942.

(Here follows photolithograph, Exhibit "A" to Affidavit, side folio 253)

EXHIBIT "A" TO AFFIDAVIT

Columbia Broadcasting System, Inc. and Subsidiary Companies

Consolidated Balance Sheet as at December 28, 1940

Assets

Current Assets:		
Cash in banks and on hand		$7,570,151.01
Notes and accounts receivable, less reserves for time discounts and doubtful accounts, December 28, 1940—$278,248.76, December 30, 1939—$150,937.44		3,829,081.35
Inventories, at cost or market, whichever was lower		986,876.19
Total Current Assets		$12,386,108.55
Sundry Investments, Advances and Receivables, less reserves		$196,141.08
Investments in and Advances to Affiliated Companies, less reserves		$69,351.00
Prepaid Insurance, Taxes, Rents, Etc.		$531,182.93
Fixed Assets, at cost:		
Land	$2,239,516.17	
Buildings, equipment and improvements to leased premises	$7,908,124.03	
Less—Reserves for depreciation and amortization	2,998,996.65	
	$4,909,127.38	
Fixed Assets, less reserves		$7,148,643.55
Goodwill, represents premiums paid for capital stock of merged subsidiaries formerly consolidated		$2,000,115.94
		$22,331,543.05

Liabilities and Capital

Current Liabilities:		
Notes payable to banks		$200,000.00
Accounts payable and sundry accruals		3,111,250.29
Reserve for Federal income and excess profits taxes		2,425,000.00
Mortgage instalments due within one year		155,800.00
Total Current Liabilities		$5,892,050.29
Deferred Income		$29,689.34
Mortgages Payable (including $40,000 standing demand)		$1,421,350.00
Notes Payable to Banks, Due After One Year		$400,000.00
Reserve for Contingencies		$222,707.54
Capital and Surplus:		
Capital stock—$2.50 par value:		
Authorized—1,500,000 shares each Class A and B (Note 1)		
Issued — 960,203 shares of Class A and 948,674 shares of Class B at December 28, 1940		$4,772,192.50
Capital surplus, representing excess of proceeds from sales of option stock over the par value thereof		146,809.20
Earned surplus		10,502,414.82
		$15,421,416.52
Less—Cost of 2,850 shares of Class A stock and 189,750 shares of Class B stock reacquired and held in treasury		1,055,670.64
Total Capital and Surplus		$14,365,745.88
		$22,331,543.05

[fol. 254] EXHIBIT "B" TO AFFIDAVIT

Statement of the Columbia Broadcasting System to the public, to advertisers, and to advertising agencies (May 15, 1935).

As radio broadcasting expands its audience and augments its influence, there devolves upon the broadcaster and the program sponsor an ever greater responsibility.

Similarly, as radio continues to become a more intimate force in the life of people, they tend to be more sensitive to broadcasting they like and to broadcasting they do not like. It is incumbent upon the broadcaster constantly to examine general policy so as to assure steady progress in building and holding radio's audience. Such watchfulness serves the interests of the audience, of the advertiser, and of the broadcasting companies alike.

The Columbia Broadcasting System has given particular consideration to recent trends in two general types of commercial program: those which are designed for children, and those involving unpleasant discussions of bodily functions, bodily symptoms, or other matters which similarly infringe on good taste. In addition, as a result of expressed public interest, careful study has been given to the amount of time that should be used by sponsors for their advertising messages.

Children's programs

Wide variations in viewpoint exist among parents as to programs which they regard as suitable for their children to hear, and similar differences exist between parents and children. The same divergence of opinion is frequently found among authorities.

Commercial sponsors of broadcasts addressed to children are devoting great effort and much money to creating programs that merit the approval both of child and parent.

It is also true that there have been instances of poor judgment and careless execution. To eliminate such faults would be gratifying to all those who feel a deep responsibility for the rearing and education of impressionable youth.

The Columbia Broadcasting System has no thought of setting itself up as an arbiter of what is proper for children to hear; but it does have an editorial responsibility to the

[fol. 255] community, in the interpretation of public wish and sentiment, which cannot be waived.

In accordance with this responsibility we list some specific themes and dramatic treatments which are not to be permitted in broadcasts for children.

The exalting, as modern heroes, of gangsters, criminals and racketeers will not be allowed.

Disrespect for either parental or other proper authority must not be glorified or encouraged.

Cruelty, greed and selfishness must not be presented as worthy motivations.

Programs that arouse harmful nervous reactions in the child must not be presented.

Conceit, smugness, or an unwarranted sense of superiority over others less fortunate may not be presented as laudable.

Recklessness and abandon must not be falsely identified with a healthy spirit of adventure.

Unfair exploitation of others for personal gain must not be made praiseworthy.

Dishonesty and deceit are not to be made appealing or attractive to the child.

We realize that distinctions in aesthetic values and feeling which may be wholly obvious between two given treatments of dramatic material cannot always be easily specified in words. Thus, for instance, it is not easy to capture in definition the fine distinctions between the pure fantasy which comprises some of the world's greatest literature for children, and the fantastic distortion of realities which is unsuitable for a youthful audience. None the less, the differences between these forms of entertainment become rather obvious when the two are compared side by side.

A program for children of elementary school age should offer entertainment of a moral character in the widest social sense. It should not obtain its entertainment value at the cost of distorting ethical and social relationships in a manner prejudicial to sound character development and emotional welfare.

In general, it is worth noting that the literature for children which continues to find their favor through many generations offers heroes worthy of the child's ready impulse to hero worship, and of his imitative urge to pattern him-

[fol. 256] self after the hero model. Such literature, whether created 100 years ago or written today, succeeds in inspiring the child to socially useful and laudable ideals such as generosity, industry, kindness and respect for authority; it opens doors into wide worlds that may be reality or fantasy, but are in neither event ugly or repellent in aspect; it serves, in effect, as a useful adjunct to that education which the growing and impressionable child is absorbing during every moment of its waking day.

It is our hope and purpose to stimulate the creation of a better standard in children's programs than has net been achieved.

To be of assistance in reaching this goal, Columbia is engaging the services of an eminent child-psychologist who will have the benefit of an advisory board of qualified members, with the special purpose of pointing the way toward programs designed to meet the approval of parents, children and educators alike. Columbia hopes thus to be equipped to appreciate and apply the parent's practical point of view no less than to reflect studied scientific judgment. The name of this consulting authority, and the membership of this committee, will be announced soon; and the new policy becomes completely effective July 30.

Advertising Which Discusses Internal Bodily Functions, Symptons, etc.

The Columbia Broadcasting System has concluded, after serious consideration, to permit no broadcasting for any product which describes graphically or repellently any internal bodily functions, symptomatic results of internal disturbances, or matters which are generally not considered acceptable topics in social groups.

This policy will specifically exclude from the Columbia Network not only all advertising of laxatives as such, but the advertising of any laxative properties in any other product. It will further exclude the discussion of depilatories, deodorants, and other broadcasting which, by its nature, presents questions of good taste in connection with radio listening.

As to new business, this policy becomes effective immediately, May 15, 1935. As to existing business, it becomes effective as rapidly as present commitments with clients expire. The last of these expires in March, 1936. Meanwhile, the advertising continuities for any such product are

[fol. 257] to be so worded as to conform strictly with a specific standard of new requirements.

Many programs containing such advertising in the past have offered entertainment of great merit, judged by the strictest standards.

On the other hand, many people prefer not to hear such advertising over the radio, regardless of the excellence of the program. The reasons for this viewpoint is obvious: radio broadcasting is heard by mixed and assorted groups of all kinds, in the home, in restaurants, and in public meeting places. In certain groups a listener may find it distasteful to hear a discussion of some subject which under other circumstances he finds wholly fitting and proper.

Similarly, we realize that the personal and often intimate quality of the human voice, radio's medium of presenting its sponsors' messages, forbids discussing subjects on the air in a manner which might be wholly acceptable when read in type.

Commercial Announcements

In the last several years advertisers and agencies have themselves been responsible, in many instances, for the discovery that brief and skillful handling of the commercial announcement—rather than obviously excessive and insistent sales talk—creates effective response and universal commendation and good will.

The Columbia Broadcasting System recognizes, with many advertisers and with the public, the desirability of avoiding advertising announcements that are too lengthy or too frequent.

As a result, numerous advertisers have condensed their sales announcements to a marked extent, to their own satisfaction and the demonstrated approval of the listening audience.

With the interest of the audience and of the great majority of advertisers in mind, the Columbia Broadcasting System considers it desirable, at this time, to set the following maximum allowances for commercial announcements, effective July 30, 1935:

Evening Programs

A maximum of 10 per cent of the total broadcasting period may be devoted to the sponsor's commercial announcements,

[fol. 258] including contests and offers, on programs broadcast after 6:00 P. M. This applies to all full-hour programs, three-quarter hour programs, and half-hour programs. A single exception to the ten per cent ratio will be made on quarter-hour programs, on which an additional allowance not to exceed 40 seconds will be made in recognition of the fact that the short program necessarily requires as much time as the longer one for routine identification announcements.

The following table shows, in minutes and seconds, the maximum amount of commercial talk which will be permitted, under these limits, on programs of various lengths broadcast after 6:00 P. M.:

Full-hour programs:

All commercial announcements not to total more than

6 minutes

Three-quarter hour programs:

All commercial announcements not to total more than

4 minutes 30 seconds

Half-hour programs:

All commercial announcements not to total more than

3 minutes

Quarter-hour programs:

All commercial announcements not to total more than 2 minutes 10 seconds

Unpleasantly rapid delivery of the sales message, to effect a crowding of excessive material into the period allowed for the commercial announcement, will not be permitted.

Daytime Programs

The Columbia Broadcasting System has decided on a lesser curtailment of the amount of advertising in day-time programs for a number of reasons. Programs broadcast during the morning and afternoon hours serve vast numbers of women as a medium of useful information. Many

of these programs are educative in both cultural and prac- [fol. 259] tical fields. Many of them offer valuble help in solving household economic problems, discussion of which requires more detailed statement of the sponsor's service or product. To deprive the daytime listener of such discussion would subtract from the broad usefulness of radio broadcasting.

Sponsored programs in the daytime will accordingly be allowed a maximum of 15 per cent of the total broadcast period for commercial announcements, with an additional 40 seconds on the quarter-hour program.

Public Acceptance

We are satisfied that the best thought of many leading advertisers as well as of the broadcasting industry is reflected in these policies. They set higher standards than broadcasting has attempted before.

We have adopted them after years of experience and careful consideration of every aspect of the problems involved. For these new policies, we ask the full cooperation of the public, the advertiser and the broadcasting industry.

Basic Advertising Policies

The three important new policies set forth in the foregoing statement represents an extension of basic Columbia policies with which advertisers and advertising agencies have long been familiar, and which have served to maintain commercial broadcasting on the Columbia Network on a high ethical plane. These basic points of policy, most of which have been in effect since the inception of the Columbia Network, are here re-stated:

1. No false or unwarranted claims for any product or service.

2. No infringements of another advertiser's rights through plagiarism or unfair imitation of either program idea or copy.

3. No disparagement of competitors or competitive goods.

4. No lottery or "drawing contest." No contest of any kind in which the public is unfairly treated.

5. No programs or announcements that are slanderous, obscene, or profane, either in theme or in treatment.

6. No ambiguous statements that may be misleading to the listening audience.

[fol. 260] 7. Not more than two price mentions on a 15-minute program.

Not more than three price mentions on a half-hour program.

Not more than five price mentions on a full-hour program.

8. No advertising matter, or announcements, or programs which may, in the opinion of the System, be injurious or prejudicial to the interests of the public, the Columbia Broadcasting System, or honest advertising and reputable business in general.

9. No appeals for funds.

10. No testimonials which cannot be authenticated.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HERBERT V. AKERBERG IN SUPPORT OF THE MOTION OF PLAINTIFF COLUMBIA BROADCASTING SYSTEM, INC., FOR A PRELIMINARY INJUNCTION

I, HERBERT V. AKERBERG, being first duly sworn, do depose and say:

1. I am employed by the Columbia Broadcasting System, Inc., the plaintiff in this action, as Vice President in charge of Station Relations. I have been employed in this capacity since 1936. As Vice President I am in charge of and supervise the work of the Station Relations Department. From 1933 to 1936, I was General Manager of this department and my duties were substantially what they are now.

2. I have been employed in the broadcasting industry continuously since 1922. From 1922 to 1928 I managed and operated two broadcast stations in Columbus, Ohio. From 1928 to 1929 I was employed by the Bell Telephone Laboratories as Radio Installation Design Engineer. In that capacity, I designed and laid out the studios, the studio

equipment and the physical layout of the Columbia Broadcasting System. I was first employed by Columbia [fol. 261] Broadcasting System, Inc. in 1929, as Assistant Chief Engineer, became Chief Engineer about six months later and continued as such until 1931. In that capacity I supervised the technical operations of the network. From 1931 to 1933 I was relieved of administrative duties as Chief Engineer and devoted my time to studying methods of improving the physical and technical aspects of Columbia's network operations, and advising the affiliates on the improvement of their technical facilities.

3. The Station Relations Department of Columbia negotiates all contracts and renewals of contracts with broadcast stations for their affiliation with the Columbia network. It also administers the performance of these agreements by Columbia. This involves the furnishing of sustaining program service, the financial relations between Columbia and the stations, consultation with and advice to the stations on their engineering, sales, program, financial, public relations and other problems.

4. Since the department first came under my supervision in 1933, we have negotiated hundreds of affiliation contracts or renewals of existing affiliation agreements. Negotiations for affiliation of stations not yet affiliated with the network ordinarily require from three months to a year to be consummated; negotiations for renewal of expiring existing contracts ordinarily require from one to six months time.

In the ordinary course of business we begin to negotiate for the renewal of existing contracts from six months to a year prior to the date of determination of the contract. In some instances, where the circumstances require it, we have begun negotiations for the renewal of an existing contract as long as two years prior to its termination. Columbia has regular affiliation relationships with 115 stations licensed by the Federal Communications Commission; the termination dates of the contracts are staggered and the contracts terminate in different years and at different times during the year. The Station Relations Department is therefore continually engaged in commencing, continuing and completing negotiations with various stations for affiliation agreements or for the renewal of such agreements. On or about May 2, 1941 we were engaged in conducting negotiations with various affiliates for the renewal of their

affiliation agreements. The names of such stations and the [fol. 262] expiration dates of the contracts and of their licenses follow:

Station	Location	Contract Expiration Date	License Expiration Date
KFBB	Great Falls, Mont	Aug. 8, 1941	June 1, 1941
KGVO	Missoula, Mont	Aug. 8, 1941	June 1, 1941
CKAC	Montreal, Canada	Oct. 4, 1941	—
WHIO	Dayton, Ohio	Dec. 14, 1941	June 1, 1941
WIBX	Utica, N. Y.	Dec. 31, 1941	Oct. 1, 1941
WISN	Milwaukee, Wisc	Dec. 31, 1941	June 1, 1941
WCHS	Charleston, W. Va.	Feb. 13, 1942	April 1, 1942
WPAR	Charleston, W. Va.	Feb. 13, 1942	Dec. 1, 1941
WMAZ	Macon, Ga	April 3, 1942	Feb. 1, 1942
WNBF	Binghamton, N. Y.	April 4, 1942	Dec. 1, 1941
WHCU	Ithaca, N. Y.	April 4, 1942	Feb. 1, 1942
WDBO	Orlando, Fla.	April 14, 1942	April 1, 1942
WKBH	LaCrosse, Wisc	April 24, 1942	Aug. 1, 1941
KGMB	Honolulu	May 1, 1942	April 1, 1942
KHBC	Honolulu	May 1, 1942	Oct. 1, 1941
WWNC	Asheville, N. C.	May 29, 1942	April 1, 1942
WDAE	Tampa, Fla.	July 14, 1942	June 1, 1941
WMT	Cedar Rapids, Iowa	Dec. 31, 1942	April 1, 1942
KRNT	Des Moines, Iowa	Dec. 31, 1942	Aug. 1, 1941
WHAS	Louisville, Ky	Jan. 27, 1943	Feb. 1, 1942
WWL	New Orleans, La	Nov. 19, 1943	Feb. 1, 1942

Negotiations for the renewal of affiliation contracts had been progressing with these stations for some time. All of the contracts subsisting between Columbia and such stations, and for the renewal of which negotiations were proceeding between such stations and Columbia on or about May 2, 1941, contained clauses referred to in Paragraph Fifth of the Complaint in this action. These clauses have been the foundation of successful network operation and they are necessary to the continued existence of strong and successful network operation.

5. As a result of the Commission Order of May 2, 1941, negotiations with reference to the renewal of these agreements with the stations have been terminated because the order prohibits any licensee from entering into such contracts, under the penalty of the denial of the renewal of its license.

In addition the Station Relations Department has been negotiating with Station WGBR, Goldsborough, N. C., and Station WGTM, Wilson, N. C. for affiliation agreements of the kind specified in Paragraph Fifth of the Complaint. These negotiations have ceased because of the danger of the denial of their licenses if they should enter into such agreements. As the result of the Commission Order and its effect upon negotiation with stations for contracts or

[fol. 263] renewal thereof, the Station Relations Department has ceased functioning in these matters completely and is unable to continue the regular conduct of its business.

6. Not later than November 15, 1941 when the said Order becomes effective as to existing contracts,* all the existing contracts of affiliation between Columbia and licensees of the Commission must be abrogated or repudiated by these stations or they will face the certain denial of their licenses. As a result, many stations have threatened that they will cancel or repudiate their contracts of affiliation prior to the effective date of the said order, and many stations have already done so, as indicated by communications received from such stations, copies of some of which are hereto annexed and marked Exhibits "A" to "T", inclusive.

Herbert V. Akerberg.

Subscribed and sworn to before me this 29th day of October, 1941. Margaret E. Landry, Notary Public, Westchester County. N. Y. Co. Clk's No. 940, Reg. No. 2 L 573. Term Expires March 30, 1942.

EXHIBIT "A" TO AFFIDAVIT

WADC Broadcasting Station

Basic Member Columbia Network

Akron, Ohio

May 20, 1941.

Columbia Broadcasting System, Inc.,
485 Madison Avenue,
New York, New York.

GENTLEMEN:

Reference is made to the contract dated June 4, 1938, between your corporation and me, governing the affiliation of my station, WADC, with your network.

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*Originally set for July 31, 1941, this effective date was postponed by the Commission, first to September 16, 1941, and later to such date as the Commission might fix. On October 11, 1941 the Commission issued a supplemental order fixing this effective date at November 15, 1941.

[fol. 264] Paragraph nine of that contract provides: "The obligations under this agreement are subject to all applicable laws, rules and regulations, present and future, especially including rules and regulations of the Federal Communications Commission."

You are, no doubt, familiar with the requirements enacted by the Federal Communications Commission May 2, 1941, numbered as sections 3.'01 to 3.108 of the Rules and Regulations. Those requirements became effective on the date of their announcement and must be complied with within ninety days. As you know, the Commission's new regulations effectuate certain policies with regard to network broadcasting by imposing requirements upon licensees, rather than upon network organizations.

The impact of these regulations is such that any failure to comply with them will endanger my license and its renewal. Each section of the rules commences: "No license shall be granted to a standard broadcast station" etc.

Therefore, under the provisions of the Commission's new regulations and conformable to the provisions of paragraph nine above quoted, I must, to preserve my property, come to a clear understanding with you as to the changes in our relationship brought about by our new status and obligations under the regulations.

I have considered the question of whether or not my contract stands amended by operation of law, as might be considered provided by paragraph nine, and have come to the view that any such amendment, if it exists, is insufficient to protect my interests. Since the prohibition of the regulations extends against "any contract, arrangement, or understanding, express or implied", I am certain that specific exclusion must be had of any such arrangements.

My present contract violates the Commission's regulations in several important respects.

I shall, therefore, be compelled to cancel that contract and cease affiliation with your network unless it is now possible to work out a revision of the contract which will bring me within the requirements of the Commission.

Accordingly, I propose certain specific amendments to the contract.

Paragraph two of the contract provides as follows:

"2. The Station will broadcast all sponsored programs offered to it by Columbia during the time when the station [fol. 265] is licensed to operate, but need not (except in occa-

sional instances of sponsorship of special events, such as World Series broadcasts, not exceeding two weeks in duration at any one time) accept programs in excess of fifty 'converted hours' (as defined below, but computed, during the entire term of this agreement, on the basis of the differences in rates at different hours specified in Columbia's Rate Card No. 23) per week. The Station may require Columbia to give not less than twenty-eight days prior notice of the commencement of sponsored programs for new accounts. Either the Station or Columbia may on special occasions substitute for one or more of such sponsored programs sustaining programs devoted to education, public service or events of public interest without any obligation to make any payment on account thereof, and in the event of such substitution by either party, it will notify the other by wire as soon as practicable after deciding to make such substitution. In case the Station has reasonable objection to any such sponsored program or the product advertised thereon as not being in the public interest the Station may, on three weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the Station shall be satisfied: The Station will not make spot announcements in the 'break' occurring in the course of a single network program or contiguous programs for the same sponsor and will, at the request of Columbia, desist from making commercial spot announcements in the 'break' occurring before or after specified network programs."

This must now be changed to read:

"2. The Station will broadcast all sponsored programs offered to it by Columbia during the time when the station is licensed to operate and which, prior to the broadcasting thereof, have been accepted by the Station for broadcasting. The Station may require Columbia to give not less than twenty-eight days prior notice of the commencement of sponsored programs for new accounts. Columbia may on special occasions, substitute for one or more of such sponsored programs sustaining programs devoted to education, public service or events of public interest, without any obligation to make any payment on account thereof and in the event of such substitution Columbia will notify the [fol. 266] station by wire as soon as practicable after de-

eiding to make such substitutions. Nothing herein contained shall be understood or construed to prevent or hinder the station from scheduling programs before Columbia finally agrees to utilize the time during which such programs are scheduled, nor to require the station to clear time already scheduled when Columbia seeks to ultilize the time: Nothing herein contained shall be construed or understo-d with respect to programs offered pursuant to this contract to prevent or hinder the station from rejecting or refusing programs which the Station reasonably believes to be unsatisfactory or unsuitable or, with respect to Columbia programs, so offered and already contracted for, to prevent the station from rejecting or refusing any program which in its opinion is contrary to the public interest, or from substituting a program of outstanding local or national importance. The Station will not make spot announcements in the 'break' occurring in the course of a single network program of contiguous programs for the same sponsor and will at the request of Columbia desist from making commercial spot announcements in the 'break' occuring before or after specified network programs."

I suggest the elimination of the following language from paragraph five of the contract:

"and will maintain such licenses under copyrights as are necessary to enable the Station to broadcast the programs to be furnished by Columbia."

The second sentence of paragraph six provides:

"In the event of any change of programs, Columbia will notify the station as soon as possible, and the Station will make every effort immediately to conform with the substituted programs."

There should be added at the end of this provision the following additional language:

"subject, however, to all of the standards and requirements of paragraph two hereof."

Paragraph eight of the contract now provides as follows:

"8. Columbia will continue the Station as the exclusive Columbia outlet in the city in which the Station is located

and will so publicize the Station, and will not furnish its [fol. 267] exclusive network programs to any other station in that city, except in case of public emergency. The Station will operate as the exclusive Columbia outlet in such city and will so publicize itself, and will not join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations. The Station shall be free to join occasional, local, statewide or regional hook-ups to broadcast special events of public importance."

This must now be changed to read:

"Nothing herein contained shall mean or shall be construed to mean that the Station is in any manner prevented or hindered from or penalized for broadcasting the programs of any network organization other than Columbia. The Station asserts no rights under this agreement or otherwise to prevent or hinder Columbia from delivering all or any of its programs for transmission by any other station whatsoever."

Paragraph twelve must be so amended as to provide that the duration of the contract shall not exceed one year from the time that we have completed our negotiations for the amendments requested in this letter.

Please give this matter your immediate attention, as it is of importance to me in maintaining my license status that I effectuate the foregoing or equivalent amendments at the earliest moment.

Yours truly, Allen T. Simmons (Signed).

EXHIBIT "B" TO AFFIDAVIT

Radio Station WAIM

Anderson, S. C.

Business Office June 17, 1941.

Registered Mail

Mr. H. V. Akerberg, Vice-President,
Station Relations Department,
Columbia Broadcasting System, Inc.,
New York City.

DEAR MR. AKERBERG:

In reference to our Network affiliation contract between the Columbia Broadcasting System and Radio Station [fol. 268] WAIM which has been in effect since July 17, 1937, and on which there was recently exercised an extension option of six months by you, for the use of the facilities of broadcast station WAIM located at Anderson, South Carolina, we are assuming that this agreement will be continued and carried out on such a basis and in such a way as will fully comply with the chain broadcasting regulations promulgated by the Federal Communications Commission (F. C. C. Rules 3.101 to 3.108, inclusive) which, unless otherwise ordered, are to become effective on and after August 2, 1941.

If the effective date of the rules above referred to should be postponed, or if the rules mentioned should be amended or modified, then we assume that both you and we are to and will construe the agreement above mentioned in such a way as to comply with said rules.

So that our records may be complete in this connection, please acknowledge receipt of this communication at your earliest opportunity and oblige.

Cordially yours, (Signed) Wilton E. Hall, Owner.
Wilton E. Hall. CH.

EXHIBIT "C" TO AFFIDAVIT

WRDW

"The Voice of Augusta"

Tenth & Broad Sts.

Augusta Broadcasting Company

Affiliated with Columbia
Broadcasting System, Inc.

Augusta, Georgia

June 25, 1941.

Mr. Stephen L. Fuld,
Columbia Broadcasting System,
485 Madison Avenue,
New York, N. Y.

DEAR STEVE:

I am writing to you with reference to the new Rules and Regulations of the FCC with regard to network affiliations [fol. 269] which will no doubt require that certain modifications be made in our present contract dated December 16, 1940 between the Columbia Broadcasting System and Augusta Broadcasting Company.

The effective date of these rules is, as you know, August 2, 1941 and up to this time no extension has been made. We are, of course, willing to accept and approve whatever contractual changes are necessary in order to conform with the requirements of the Federal Communications Commission and are most anxious that the necessary changes be made within the time limit designated by the Commission.

I have no doubt but that you are already working on this matter and that everything will be worked out in sufficient time.

Kindest personal regards.

Yours very truly, (Signed) Ray, W. R. Ringson.

WRR:jo.

EXHIBIT "D" TO AFFIDAVIT

Radio Station KDAL Columbia Broadcasting System Affiliate Serving Duluth Minnesota—Superior Wisconsin and Surrounding Territory

Bradley Building

Duluth Minnesota

(CBS)

June 19, 1941.

Columbia Broadcasting System,
485 Madison Avenue,
New York, New York.

Attention: Mr. Mefford R. Runyan

GENTLEMEN:

This letter is with regard to the regulations of the Federal Communications Commission affecting chain broadcasting promulgated by the Commission May 2, 1941.

Pursuant to these regulations in their present form, we would be deprived of our opportunity to receive a renewal [fol. 270] of license of KDAL from the Commission if we persisted in the present contractual relationship with your company.

We have reviewed carefully our relationship with the Columbia Broadcasting System and we hope that we can continue our relations in the future if it is now possible to make some modifications in the contract which will permit us to comply with the requirements of the Commission.

We would, therefore, welcome an opportunity to meet with the appropriate persons in your organization to effectuate the necessary revisions of the contract.

Inasmuch as there are only ninety days from May 2, 1941 within which to comply with the Commission's requirements, we feel that arrangements for the revision of our contract should begin at once.

We would appreciate it, therefore, if we may be notified of a convenient time and place for such conference in order that we may notify the Commission at the earliest possible date of our compliance with its regulations.

Red River Broadcasting Company, (Signed) by Dalton Le Masurier, President.

EXHIBIT "E" TO AFFIDAVIT

W E R C

"Erie's Radio Center"

Presque Isle Broadcasting Co.

C. B. S. Affiliate

Erie, Pennsylvania

June 9, 1941.

Columbia Broadcasting System, Inc.
485 Madison Avenue
New York City, New York

Attention: Stephen Fuld

GENTLEMEN:

We herewith tender you our notice of cancellation of our affiliation agreement to take effect August 2nd, 1941 in accordance with the new regulations of the Federal Communications Commission. However, we desire to negotiate a [fol. 271] new agreement in accordance with the new requirements of the Federal Communications Commission.

Very truly yours, Presque Isle Broadcasting Company, Radio Station WERC, (Signed) Charles E. Denny, General Manager.

CED:DC.

EXHIBIT "F" TO AFFIDAVIT

K A R M

The George Harm Station

1333 Van Ness

Fresno, California

Hattie Harm, President
Clyde F. Coombs, Vice President and Manager

June 20, 1941.

Mr. Herbert V. Akerberg
Columbia Broadcasting System
485 Madison Avenue
New York, N. Y.

DEAR MR. AKERGERG:

In reference to our network affiliation agreement dated November 19, 1941 between KARM, The George Harm Station and the Columbia Broadcasting System, Inc., for the use of the facilities of Broadcast Station KARM, located at Fresno, California, we are assuming that this agreement will be continued and carried out on such a basis and in such a way as will fully comply with the chain broadcasting regulations promulgated by the Federal Communications Commission (F. C. C. Rules 3.101 to 3.108, inclusive) which, unless otherwise ordered, are to become effective on and after August 2, 1941.

If the effective date of the rules above referred to should be postponed, or if the rules mentioned should be amended or modified, then we assume that both you and we are to and will construe the agreement above mentioned in such a way as to comply with said rules.

[fol. 272] So that our records may be complete in this connection, please acknowledge receipt of this communication at your earliest possible opportunity.

Very truly yours, (Signed) Clyde F. Coombs, Vice President & Manager.

C:r.

EXHIBIT "G" TO AFFIDAVIT

5000 watts WKNE C.B.S.

Keene, N. H.

June 18, 1941.

Columbia Broadcasting System,
485 Madison Ave.,
New York, N. Y.

GENTLEMEN:

Pursuant to the Federal Communications Commission order dated May 2nd, 1941, in Docket No. 5060 in the matter of the investigation of chain broadcasting, we hereby serve notice of cancelation of our network contract with you to take effect August 2, 1941 or upon any extension thereof by the Commission.

However, we desire to continue our network affiliation and are ready to negotiate a new agreement which will conform to the FCC order referred to above.

Very truly yours, Twin State Broadcasting Corporation, (Signed) H. C. Wilder, President.

HCW:D.

[fol. 273] EXHIBIT "H" TO AFFIDAVIT

Scripps-Howard Radio, Inc.

Radio Station WNOX

Affiliated with

The Knoxville News-Sentinel

Knoxville, Tennessee

June 16, 1941.

Columbia Broadcasting System, Inc.,
485 Madison Avenue,
New York, N. Y.

SIRS:

In the light of new regulations issued by the Federal Communications Commission concerning network-station

agreements, dated May 2, 1941, we believe it will be necessary for us to meet and negotiate with you concerning changes which said regulations will require us to make in our agreement covering the affiliation of our Radio Station WNOX, Knoxville, Tennessee with your network.

Please advise us when an officer authorized to negotiate on behalf of our company may meet with you to discuss a new affiliation agreement which will enable our station to continue to operate as one of your affiliates and in compliance with all regulations of the Federal Communications Commission.

It will be necessary for us to reach a new agreement which will go into effect prior to the effective date of the new regulations of the Federal Communications Commission referred to above; or in the event of our failure to reach such a new agreement we hereby notify you of our intention to terminate our existing agreement as of the close of business on the day immediately preceding the effective date of said regulations.

Very truly yours, Scripps-Howard Radio, Inc.,
(signed) By R. B. Westergaard, Vice President.
Columbia Broadcasting System.

[fol. 274] EXHIBIT "I" TO AFFIDAVIT

KFAB KOIL KFOR

Central States

Broadcasting System

Omaha, Nebraska

N. Searle, General Manager.

June 19, 1941.

Mr. Herb Akerberg,
Columbia Bradcasting System,
485 Madison Avenue,
New York, N. Y.

DEAR HERB:

We have three chain broadcasting contracts with your company which require consideration since the adoption on

May 2nd of the so-called monopoly regulations (3.101 to 3.108) by the F. C. C.

We had anticipated that before this some meeting or arrangement would be inaugurated by your company for the purpose of discussing these contracts. In view of the fact that the Commission has limited the time for the compliance with their regulations to August 2nd we are taking this means of suggesting an early consideration of the present contracts with a view to negotiating new contracts which will conform in all respects to the spirit and the letter of the F. C. C. regulations.

For your information, the three contracts that we refer to are: the Affiliation Agreement of April 25, 1938 with Central States Broadcasting Company for KOIL: the original agreement entered into January 7, 1932 by KFAB Broadcasting Company and Columbia Broadcasting System and subsequent letters, making the agreement under which KFAB and WBBM are now operating; and the agreement dated June 12, 1939 between Columbia Broadcasting System and KFAB Broadcasting Company. Each of these contracts, in our opinion, require separate consideration and a new working arrangement will have to be negotiated in each instance.

[fol. 275] In view of the shortness of the time will you promptly advise us of your wishes so that we may get together. We will endeavor to meet with you at any reasonable time and place.

Very truly yours, (Signed) Don Searle, General Manager.

Don Searle/is.

EXHIBIT "J" TO AFFIDAVIT

KGLO

The Mason City Globe-Gazette Station

Mason City, Iowa

June 19, 1941.

Mr. John G. Gude,
The Columbia Broadcasting System, Inc.,
485 Madison Avenue,
New York City, New York.

DEAR MR. GUDE:

On examination of Rules 3.101 to 3.108, inclusive, it appears that your present network contract with us will be illegal after July 31, 1941.

We, of course, desire to continue our network affiliations with CBS, but we cannot afford to do so at the expense of our license.

In view of these new regulations, I would appreciate having you submit for our approval a new agreement which will comply with the present rules.

Sincerely yours, (Signed) F. C. Eighmey, Lee P. Loomis, Secy. & Treas.

FCE:RS.

[fol. 276] EXHIBIT "K" TO AFFIDAVIT

An Affiliated Station of the Columbia Broadcasting System

WREC Broadcasting Service

"The Voice of Memphis"

Memphis, Tenn.

June 24, 1941.

Columbia Broadcasting System, Inc.,
485 Madison Avenue,
New York, N. Y.

Attention: Mr. H. V. Akerberg, V. P. Station Relations

GENTLEMEN:

In reference to the Agreement between Columbia Broadcasting System, Inc. and WREC, incorporated, dated De-

cember 13, 1933, as amended by letter agreements dated December 15, 1937 and June 6, 1939 and September 21, 1940, for the use of the facilities of Broadcast Station WREC at Memphis, Tennessee, we are assuming that this Agreement, and all extensions thereof, will be continued and carried out on such a basis and in such a way as will fully comply with the chain broadcasting regulations promulgated by the Federal Communications Commission (F. C. C. Rules 3.101 to 3.108, inclusive) which, unless otherwise ordered, are to become effective on and after August 2, 1941.

If the effective date of the rules above referred to should be postponed, or if the rules mentioned should be amended or modified, then we assume that both you and we are to and will construe the Agreement above mentioned in such a way as to comply with said rules.

So that our records may be complete in this connection, please acknowledge receipt of this communication at your earliest possible opportunity.

Very truly yours, (Signed) Hoyt B. Wooten, WREC Broadcasting Service.

Hoyt B. Wooten:ga.

[fol. 277] EXHIBIT "L" TO AFFIDAVIT

Miami Broadcasting Company

WQAM

Miami

Affiliated with Columbia Broadcasting System

June 24, 1941.

Columbia Broadcasting System, Inc.,
485 Madison Avenue,
New York, N. Y.

Attention: Mr. Herbert Akerberg, Vice President in Charge of Station Relations

DEAR MR. AKERBERG:

The Federal Communications Commission, on May 2, 1941, adopted an order in Docket No. 5060 which affects the

existing contract between the Miami Broadcasting Company and the Columbia Broadcasting System. Pursuant to this order, the Miami Broadcasting Company is herewith giving notice that it is canceling the existing contract between it and the Columbia Broadcasting System, effective on August 2, 1941, or on such other date as the Commission may designate as the effective date of the order. However, the Miami Broadcasting Company is desirous of continuing its affiliation with the Columbia Broadcasting System and receiving both commercial and sustaining programs from you. We are, therefore, prepared and willing to negotiate a new contract that will conform in every way with the new Rules and Regulations of the Federal Communications Commission and, at the same time, permit Station WQAM to continue its affiliation with Columbia.

A copy of this letter is being filed with the Federal Communications Commission.

Very truly yours, Miami Broadcasting Company,
(signed) F. W. Borton, President.

FWBet.

[fol. 278] EXHIBIT "M" TO AFFIDAVIT

Owned and Operated by KOMA Incorporated

Biltmore Hotel

KOMA

Oklahoma City's CBS Station

June 24, 1941.

Columbia Broadcasting System
485 Madison Avenue,
New York, N. Y.

Re: F.C.C. Form 335, Supplement concerning Chain Broadcasting to Application for Standard Broadcasting Authorization

GENTLEMEN:

We have completed forms #335 and attached supplemental material and forwarded it to Spearman, Sykes & Roberson, Attorneys at Law, Munsey Building, Washington, D. C.

to be filed with the Federal Communications Commission. In this connection we have furnished with those completed forms copies of our contract with the Columbia Broadcasting System and have set forth in letter of transmittal to the Columbia Broadcasting System and have set forth in letter of transmittal to the Federal Communications Commission in which we have made statement as follows:

"In view of the clause in our contact with the Columbia Broadcasting System which provided that the contract shall be subject to all applicable rules and regulations of the Federal Communications Commission, we construe our contractual relations with Columbia to have been modified so as to comply with the new network rules of the Commission to the extent that said contract may be inconsistent or in conflict with the provisions of said rules."

Very truly yours, KOMA, Incorporated, (Signed) by Bryan Mathes.

BM*BJ.

[fol. 279] EXHIBIT "N" TO AFFIDAVIT

Edgar L. Bill, President

Columbia Broadcasting System

"On The Air" Eighteen Hours Daily

Peoria Broadcasting Company

WMBD "from the Heart of Illinois"

Office and Studios, Alliance Life Building,

Peoria, Illinois

June 3, 1941.

Columbia Broadcasting System,
485 Madison Avenue
New York, N. Y.

DEAR FRIENDS:

We are at this time filling in F.C.C. Form #335 to supplement our application for renewal of license which is now

in the hands of the Commission. As you know, this form calls for information about our contract with you.

In view of the fact that our present contract with you would prohibit our getting a renewal of license according to the new F.C.C. regulations numbers 3.101, 3.102, 3.103, 3.104, 3.105, 3.106, 3.107 and 3.108, we are therefore notifying you that we desire to take advantage of Clause 9 in our contract with you, as of August 1, 1941.

It is our desire that we be released of all obligations in our present contract contrary to the new F.C.C. ruling as of August 1, 1941. You will please verify this letter in writing so that we can file copies of this letter and your answer with the Federal Communications Commission, along with Form #335.

Thank you.

Very truly yours, (Signed) Edgar L. Bill.

Edgar L. Bill. IK.

[fol. 280] EXHIBIT "O" TO AFFIDAVIT

The Agricultural Broadcasting Company

Burridge D. Butler, President. Glenn Snyder, Manager

Tel. Monroe 9700

WLS

Clear Channel—50,000 Watts—890 Kilocycles

Washington Blvd., Chicago

June 24, 1941.

Mr. J. G. Gude,
Columbia Broadcasting System,
485 Madison Avenue,
New York, N. Y.

DEAR JAP:

Your office will receive shortly, if it has not already arrived there, a letter from KOY cancelling our CBS affiliation in accordance with the August 2nd dead-line, and offer-

ing to renegotiate to make our contract conform to any FCC orders, in case it does not already do so.

That letter was occasioned by the fact that, as you know, the Commission has ordered stations to file this new Form 335 where they have any pending application. We have an application pending in the Commission for 5 KW day. Loucks advised us that when we filed that form, we should file this letter simultaneously with it, in order that we wouldn't be held up by a further exchange of conversation on that subject.

I don't know that this formality, if it is that, is necessary, but he is handling the application and thought it advisable so we acted accordingly.

I wanted to write you this, so that when it came in, you would know what prompted it.

Yours very truly, (signed) Glenn.

GS*L.

[fol. 281] EXHIBIT "P" TO AFFIDAVIT

KTUL

Columbia Broadcasting System Affiliate

Tulsa, Oklahoma

June 21, 1941.

Mr. Herbert V. Akerberg
Columbia Broadcasting System
New York City

DEAR MR. AKERBERG:

In view of Paragraph 9 in our agreement with the Columbia Broadcasting System, Inc., which provides that the contract shall be subject to all applicable rules and regulations, present and future, of the Federal Communications Commission, we construe our contractual relations with Columbia to have been modified so as to comply with the new network rules of the Commission to the extent that said contract may be inconsistent, or in conflict, with the provisions of said Rules.

Yours very truly, Tulsa Broadcasting Co., Inc., (Signed) Wm. C. Gillespie, Vice President & General Manager.

WCG:ss
Registered mail.

EXHIBIT "Q" TO AFFIDAVIT

WIBX

"The Voice of the Mohawk Valley"

Columbia Broadcasting System Affiliate

Utica, New York

July 8, 1941.

Columbia Broadcasting System,
485 Madison Avenue,
New York, N. Y.

GENTLEMEN:

The Federal Communications Commission on May 2, 1941, adopted an order in Docket No. 5060 promulgating [fol. 282] certain regulations which have a direct bearing upon the present affiliation agreement between WIBX Incorporated (Station WIBX), Utica, New York, and your Company.

The purpose of this letter is to give you notice that on August 2, 1941, or on such other date as the Commission may fix as the effective date of its order, WIBX Incorporated will consider its affiliation contract with your Company as cancelled.

However, it is the desire of WIBX Incorporated to continue to receive both commercial and sustaining programs from the Columbia Broadcasting System after the effective date of the order, and we are now prepared and willing to enter into a new arrangement which will be consistent with the new regulations of the Commission.

We are filing a copy of this letter with the Commission along with Form No. 335 in order that it may be considered in connection with our pending application for renewal of the Station license.

Respectfully yours, WIBX Incorporated, (signed)
Elliott Stewart, Executive Vice President.

ES:MC.
Send by Registered Mail.

EXHIBIT "R" TO AFFIDAVIT

570 LC. 5,000 Watts Day, 1,000 Watts Night

WNAX

Affiliated with Columbia Broadcasting System

Broadcasting Company

Studios and Offices Also in Sioux City, Iowa

Yankton, South Dakota

June 12, 1941.

Columbia Broadcasting System
485 Madison Avenue
New York, New York

Attention: Mr. Mefford Runyon

GENTLEMEN:

You are, no doubt, familiar with the regulations of the Federal Communications Commission affecting chain broadcasting as promulgated by the Commission May 2, 1941. [fol. 283] Under these regulations in their present form, we would be deprived of our opportunity to receive a renewal of license of WNAX from the Commission should we persist in the present contractual relationship with your company.

We have made a careful study of our relationship with Columbia and are hopeful that we can continue our present and satisfactory business relations in the future if it is now possible to make some modifications in the contract which will permit us fully to comply with the Commission's requirements.

We should like to meet with the appropriate persons in your organization for the purpose of effectuating the necessary revisions of the contract.

Since we have only ninety days, from May 2, 1941, to place ourselves on the basis of full compliance with the Commission's requirements, we feel that conferences looking toward the revision of our contract should commence at once.

We should, therefore, appreciate it if you will notify us of some convenient time and place for holding such conferences in order that we may, at the earliest opportunity, report to the Commission our compliance with its regulations.

Your truly, WNAX Broadcasting Company, Luther L. Hill (signed), by Luther L. Hill, Vice-President.
LLH/lj.

EXHIBIT "S" TO AFFIDAVIT

KSFO

The Associated Broadcasters, Inc.,

Palace Hotel, San Francisco, California

W. I. Dumm, President. June 28, 1941.

Columbia Broadcasting System, Inc., 485 Madison Avenue, New York, N. Y.

Attention: Mr. H. V. Akerberg, Vice Pres.

GENTLEMEN:

In reference to our network affiliation agreement dated June 26, 1936, between The Associated Broadcasters, Inc., [fol. 284] and Columbia Broadcasting System, Inc., for the use of the facilities of Broadcast Station KSFO, located at San Francisco, California, we are assuming that this agreement will be continued and carried out on such a basis and in such a way as will fully comply with the chain broadcasting regulations promulgated by the Federal Communications Commission (F. C. C. Rules 3.101 to 3.108, inclusive) which, unless otherwise ordered, are to become effective on and after August 2, 1941.

If the effective date of the rules above referred to should be postponed, or if the rules mentioned should be amended or modified, then we will assume that both you and we are to, and will construe the agreement above mentioned in such a way as to comply with said rules.

So that our records may be complete in this connection, please acknowledge receipt of this communication at your earliest possible opportunity.

Respectfully yours, (Signed) W. I. Dumm, President.

EXHIBIT "T" TO AFFIDAVIT

WKBN Broadcasting Corporation, 17 North Champion Street, Youngstown, Ohio

Associated Station of The Columbia Broadcasting System

June 19, 1941.

Columbia Broadcasting System, 485 Madison Avenue, New York, N. Y.

Attention: Mr. J. G. Gude, Mgr., Station Relations Department

GENTLEMEN:

The Federal Communications Commission on May 2nd, 1941, adopted an order—Docket No. 5060, which order is effective on August 2nd, 1941, which affects the affiliation agreement between WKBN Broadcasting Corporation and the Columbia Broadcasting System.

[fol. 285] Please take notice that, pursuant to this order, WKBN Broadcasting Corporation is cancelling its contract with Columbia—the cancellation to become effective on August 2nd, 1941, or on such other date as the Commission may determine to be the effective date of that part of the order which affects our relationship. However, we desire to continue as an affiliate of Columbia, and are now prepared and are willing to enter into a new or different arrangement with you which will be consistent in every way with the new order and regulations.

Please acknowledge receipt of this letter, a copy of which is being filed with the Commission.

Your very truly, WKBN Broadcasting Corporation, W. P. Williamson, Jr. (signed), President. W. P. Williamson, Jr. W.

In United States District Court, Southern District of New York

[Title omitted]

Affidavit of Kenneth L. Yourd

United States of America,
Southern District of New York,
City, County and State of New York, ss:

Kenneth L. Yourd, being duly sworn, deposes and says:

1. I am an attorney employed by Columbia Broadcasting System, Inc. (hereinafter sometimes called "Columbia") in its Washington, D. C. office, and have been employed by Columbia since April, 1941. I am generally familiar with the Rules and Regulations of the Federal Communications Commission, and with its practice of issuing broadcast station licenses.

2. On January, 1942 I inspected records of the Commission at its office in Washington, D. C. relating to the dates of expiration of the Standard Broadcast station licenses of the stations on the Columbia network. Such records showed [fol. 286] that the licenses of the following stations will expire on February 1, 1942:

WABC	New York	WLAW	Lawrence, Mass.
WKBW	Buffalo	WMAZ	Macon, Ga.
WBBM	Chicago	WCCO	Minneapolis-St. Paul
WCKY	Cincinnati		
WJR	Detroit	WLAC	Nashville
KFAB	Lincoln	WWL	New Orleans
WHAS	Louisville	KOMA	Oklahoma City
WCAU	Philadelphia	WRVA	Richmond
KMOX	St. Louis	KSL	Salt Lake City
WJSV	Washington	KWKH	Shreveport
WGPC	Albany, Ga.	KNX	Los Angeles
WBT	Charlotte	KQW	San Francisco-San Jose
KRLD	Dallas		
WHCU	Ithaca	KIRO	Seattle;
WNOX	Knoxville		

that the licenses of the following stations will expire on April 1, 1942:

WCAO	Baltimore	WTAD	Quincy, Ill.
WEEI	Poston	KTSA	San Antonio
WMT	Cedar Rapids	WGBI	Scranton
WPRO	Providence	WNAX	Sioux City-Yankton
WWNC	Asheville		
WCHS	Charleston, W. Va.	WSPA	Spartanburg, S. C.
KLZ	Denver	WDAE	Tampa
KROD	El Paso	WIBW	Topeka
WMMN	Fairmont, W. Va.	WMBS	Uniontown, Pa.
WKZO	Kalamazoo	KWFT	Wichita Falls, Tex.
WREC	Memphis	WKBN	Youngstown
WCOC	Meridian, Miss.	KFPY	Spokane
WQAM	Miami	KGMB	Honolulu
WDBO	Orlando	WKAQ	San Juan, Puerto Rico;
KOY	Phoenix		
WGAN	Portland, Me.		

[fol. 287] that the licenses of the following stations will expire on June 1, 1942:

WHIO	Dayton	WJAS	Pittsburgh
WFBM	Indianapolis	KGGM	Albuquerque
KMBC	Kansas City	WDOD	Chattanooga
KOIL	Omaha	KVOR	Colo. Springs
KFBB	Great Falls, Mont.	KGVO	Missoula, Mont.
		WDBJ	Roanoke
KTRH	Houston	WTOC	Savannah
WKNE	Keene, N. H.	WSBT	South Bend
KGLO	Mason City, Iowa	WORC	Worcester
		KOIN	Portland, Ore.;
WISN	Milwaukee		

that the licenses of the following stations will expire on August 1, 1942:

WADC	Akron	WTAQ	Green Bay, Wis.
WOKO	Albany	WBIG	Greensboro, N. C.
WGAR	Cleveland		
WBNS	Columbus	KLRA	Little Rock
KRNT	Des Moines	WBRY	New Haven-

WHP	Harrisburg		Waterbury
WDRC	Hartford	WMBD	Peoria
WHEC	Rochester	KTUL	Tulsa
WFBL	Syracuse	KFH	Wichita;
WCSC	Charleston, S. C.		

that the licenses of the following stations will expire on October 1, 1942:

WAIM	Anderson, S. C.	KVSF	Santa Fe
WABI	Bangor	WIBX	Utica
WCAX	Burlington	WJNO	W. Palm Beach
WRBL	Columbus, Ga.	KARM	Fresno
WCOV	Montgomery	KROY	Sacramento
WFOY	St. Augustine	KHBC	Hilo, H. I.;

that the licenses of the following stations will expire on August 1, 1943:

WEOA	Evansville, Ind.	KTUC	Tucson
WMBR	Jacksonville	WKWK	Wheeling;

[fol. 288] that the licenses of the following stations will expire on October 1, 1943:

WPAR	Parkersburg, W. Va.	WMAS	Springfield, Mass.;

that the licenses of the following stations will expire on December 1, 1943:

WBAB	Atlantic City	KDAL	Duluth
WRDW	Augusta, Ga.	WDNC	Durham
WNBF	Binghamton	WERC	Erie;

and that the licenses of the following stations are issued on an indefinite, temporary basis:

WGST	Atlanta	WAPI	Birmingham

3. On January 3, 1942 I obtained from the United States Department of Justice, in Washington, D. C., a copy of the complaint in a civil action in the District Court of the United States for the Northern District of Illinois, Eastern Division, entitled "United States of America, Plaintiff v.

Columbia Broadcasting System, William S. Paley, Edward Klauber, and Herbert V. Akerberg", a copy of which is hereto annexed, marked Exhibit A.

Kenneth L. Yourd.

Subscribed and sworn to before me this 5th day of January, 1942. George A. Burwell, Notary Public. N. Y. Co. Clk's No. 527, Reg. No. 3B800. Kings Co. Clk's No. 119, Reg. No. 3459. Bronx Co. Clk's No. 62, Reg. No. 248B43. Queens Co. Clk's No. 2167, Reg. No. 8330. Certificates filed in Westchester and Richmond Counties. Commission Expires March 30, 1943. (Seal.)

[fol. 289] EXHIBIT "A" TO AFFIDAVIT OF KENNETH L. YOURD

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. —

UNITED STATES OF AMERICA

v.

COLUMBIA BROADCASTING SYSTEM, WILLIAM S. PALEY, EDWARD KLAUBER, and HERBERT V. AKERBERG

Complaint

The United States of America, by J. Albert Woll, its attorney for the Northern District of Illinois, Thurman Arnold, Assistant Attorney General, and Victor O. Waters, Special Assistant to the Attorney General, acting under the direction of the Attorney General, files this complaint against the following named defendants and complains and alleges upon information and belief as follows:

I

Defendants

1. That the Columbia Broadcasting System, hereinafter referred to as CBS, a corporation organized and duly authorized to do business under the laws of the State of New York, is made a defendant herein;

2. That the following individuals, officers, or directors of the corporate defendant, are named as defendants herein; that they have during the period covered by this Complaint actively engaged in the management, direction and control of the affairs and policies of the corporate defendant and in particular those affairs and policies which are covered by this Complaint, and have authorized, ordered and done the acts of the defendants constituting the offenses hereinafter charged;

William S. Paley, President and member of the Board of Directors of CBS;
Edward Klauber, Executive Vice President and member of the Board of Directors of CBS;
Herbert V. Akerberg, Vice President of CBS;

[fol. 290]

II

Description of the Radio Broadcasting Industry

3. That a radio network system consists of two or more stations which broadcast the same program simultaneously, the program being transmitted to the stations comprising the network either from the station originating the program or from some other source over telephone wires usually leased from the American Telephone and Telegraph Company; that stations composing a network are often referred to as "affiliated" with a network and their relations with the network are usually covered by the terms of so-called "affiliation contracts" entered into separately by each of the stations with the network company; that a broadcasting station may be affiliated with more than one network and regardless of that affiliation may carry programs of other networks on a temporary or permanent basis by means of a wire line with such other network; that a network operation may be national or regional in scope; that at the time of the filing of this Complaint there are in operation four national network systems in the United States; that two of said networks are operated by the National Broadcasting Company, hereinafter referred to as NBC, one by the Mutual Broadcasting System, hereinafter referred to as MBS, and one by CBS;

4. That programs transmitted by the networks to their affiliated stations are of two types, namely, "sustaining" or "commercial"; that "sustaining" programs are programs

which are not sponsored or paid for by an advertiser, and include, among others, programs transmitted by the networks as a public service; that "commercial" programs are those which are sponsored and paid for, usually by an advertiser; that a broadcasting station affiliated with a national network is permitted to broadcast all of the network "sustaining" programs; that such station may broadcast a "commercial" program carried by the network only upon the consent of the sponsor or advertiser; that while a station affiliated with a network receives no revenue for broadcasting "sustaining" programs it is required to compensate the network whenever "sustaining" programs are carried where affiliation is with NBC or CBS; that stations affiliated with networks receive compensation only when they carry "commercial" programs;

[fol. 291] 5. That the nature of the radio spectrum is such that the number of broadcasting stations which can operate, the power which they can utilize, the number and character of broadcasting stations available for participation in network broadcasting, and the facilities available for licensing are limited;

6. That an advertiser using the facilities of a nation-wide radio network is interested in securing the widest possible circulation and the greatest number of listeners; that the circulation of an individual station participating in a network program depends on its geographic location, the power under which the station is authorized to operate, the frequency assigned to it, and its hours of operation; that the power employed by a broadcasting station determines the strength of its signal and affects the scope of the area it can serve; that the lower the frequency assigned the farther the station's signal will carry and the larger the area served;

7. That there are more than 800 commercial radio broadcasting stations in the United States which are operated under the authority of the Federal Communications Commission (hereinafter referred to as the FCC) pursuant to the Act of Congress known as the Communications Act of 1934, approved June 19, 1934, and prior acts of Congress; that in many cities and towns of the United States there are less than four broadcasting stations having comparable facilities; that in such cities and towns it is impossible for the four existing networks or for potential networks to secure

affiliated station outlets where such available stations are controlled exclusively by existing networks; that 105 cities and towns in the United States, each having a population in excess of 50,000 have three or less full-time commercial stations in each (list attached hereto as Exhibit A and made a part hereof);

8. That radio advertisers in whose behalf commercial radio programs are produced are of three types, namely, national advertisers using national network facilities, national advertisers using electrical transcriptions, and local advertisers sponsoring programs over local stations either through the medium of performance by live talent or through the reproduction of programs recorded upon electrical transcriptions; that a national advertiser may contract for the [fol. 292] use of a station's time either by entering into contractual arrangements with the network with which the station is affiliated or by contracting directly with the several stations affiliated with the network; that the program of the national advertiser, using network facilities, must be produced through the performance of live talent present in the studio of the station originating the network broadcast; that the program of a national advertiser who does not use network facilities is usually produced by the reproduction of programs recorded upon electrical transcriptions; that electrical transcriptions are mechanical devices upon which programs are recorded or mechanically reproduced for the exclusive use of radio broadcasting stations;

III

Position of Defendants in the Radio Broadcasting Industry

9. That CBS has for its key station WABC in the City and State of New York; that CBS is composed of radio stations which comprise the "basic" network and others which are known as "supplemental" affiliations; that the CBS "basic" network is composed of 28 stations, either licensed to or affiliated with CBS; that there are in addition thereto more than 93 stations affiliated with CBS which are supplemental to the CBS "basic" network and are available at the option of the advertiser;

10. That of 52 existing clear channel radio stations in the United States CBS owns, controls or has affiliated with it 18, and NBC 32; that most of the full-time regional sta-

tions are likewise affiliated with either CBS or NBC; that excluding low-powered local stations, more than half of all the stations in the country are affiliated with CBS and NBC; that of the 92 cities in the United States with more than 100,000 population, less than 63 have three or more full-time stations and less than 37 have four or more full-time stations; that there are more than 45 cities in the United States with a population in excess of 50,000 served by CBS or NBC or both, in which no other network can procure an independent full-time broadcasting station outlet because of the control exerted by CBS and NBC; that in over 20 cities of the United States, including Cleveland, Indianapolis, Houston, Birmingham, Providence, Des Moines, Albany, Charlotte and Harrisburg, other networks can pro- [fol. 293] cure only limited access to the existent radio broadcasting facilities;

11. That CBS is the direct operator and licensee, under licenses issued by the FCC, of the following broadcasting stations, having the call letters, power, and locations set out below:

Call Letters	Location	Power
WABC	New York	50,000 Watts
WJSV	Washington	50,000 "
WBT	Charlotte, N. C.	50,000 "
WEEI	Boston	5,000 "
WBBM	Chicago	50,000 "
WCCO	Minneapolis.	50,000 "
KMOX	St. Louis	50,000 "
KNX	Los Angeles	50,000 "

12. That for the years 1938, 1939 and 1940, the net time sales for the entire radio industry were $117,379,456, $129,968,026; and $154,823,787, respectively, as compared with $25,450,351, $30,961,499 and $35,630,063 for CBS; $35,611,145, $37,747,543 and $41,683,341 for NBC; and $2,272,662, $2,610,969 and $3,600,161 for MBS;

13. That the power and dominant position of NBC and CBS are further shown by comparing the net operating income for the entire broadcasting industry with that of NBC and CBS; that for the years 1938, 1939 and 1940, the net operating income for the entire broadcasting industry was $18,854,784, $23,837,944 and $33,296,708 respectively, as com-

pared with $4,329,510, $6,128,686, and $7,431,634 for CBS; and $4,137,503, $4,103,909, and $5,834,772 for NBC;

14. That the relative positions of CBS and NBC in the radio industry are apparent from the fact that in each of the years mentioned CBS and NBC have each enjoyed net profits in excess of the gross revenues of their only competitor in national network operations;

15. That stations affiliated with CBS and NBC have over 85% of the total combined night-time power of all stations in the United States; that by reason of the dominant position in the industry of CBS and NBC and because of the large volume of business controlled by them and the many [fol. 294] advantages afforded radio stations through affiliation with them a network affiliation or a continued network affiliation with either CBS or NBC is desired by practically all commercial radio broadcasting stations; that CBS and NBC have exercised the power inherent in their dominant position by imposing upon their respective affiliated broadcasting stations certain identical tying clauses which have prevented such stations from dealing with other competing network systems and have prevented CBS and NBC from dealing with radio stations other than their regular network affiliated stations; that both CBS and NBC have optioned all, or a part, of their respective affiliated stations' time on the air, a substantial portion of which is never used by either network; that NBC, as well as CBS, has entered into contracts of several years' duration with each of its affiliated stations, and is the owner, operator and licensee of radio stations located in lucrative marketing areas;

IV

Jurisdiction and Venue

16. That this Complaint is filed and the jurisdiction of this Court invoked to obtain equitable relief against defendant Columbia Broadcasting System and certain of the officers and members of the Boards of Directors thereof, because of their violations, jointly and severally, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act;

17. That the unlawful combination and conspiracy hereinafter described to restrain commerce among the several states of the United States has been carried on in part within

the Northern District of Illinois, Eastern Division, and many of the unlawful acts pursuant thereto have been performed by defendants and their representatives in said District; that the interstate commerce in radio broadcasting and electrical transcriptions, as hereinafter described, is carried on in part within said District; that said corporate defendant has a usual place of business in said District and there transacts business and is within the jurisdiction of this Court for the purpose of service;

[fol. 295]

Interstate Commerce

a. Radio Broadcasting

18. That radio broadcasting stations, including network broadcasting systems in the United States, are engaged in commerce among the several states of the United States, the District of Columbia, and within the Northern District of Illinois, Eastern Division; that each station is an instrumentality through which energy, ideas and entertainment are transmitted across state or national boundaries to radio listeners in the United States, the District of Columbia, and foreign countries;

b. Electrical Transcriptions

19. That more than 50% of the electrical transcriptions produced in the United States for the exclusive use of radio broadcasting is produced or manufactured in the States of New York and California and shipped to radio broadcasting stations located throughout the United States, the District of Columbia, and within the Northern District of Illinois, Eastern Division; that a substantial portion of the time devoted to radio broadcasting by radio broadcasting stations is consumed by the broadcasting of intelligence, entertainment and information recorded upon electrical transcriptions;

VI

The Combination and Conspiracy

20. That the defendants named herein, together with affiliated broadcasting stations, each well knowing of the matters and things hereinbefore alleged, for many years

preceding the filing of this Complaint and continuing to the date of the filing hereof, have been engaged in the United States, and within the Northern District of Illinois, Eastern Division, in a wrongful and unlawful combination and conspiracy in restrain of the aforesaid interstate commerce and in a wrongful and unlawful combination and conspiracy to attempt to monopolize the aforesaid interstate commerce in radio broadcasting in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and [fol. 296] Monopolies" (15 U. S. C. A. 1 and 2), and have conspired to do all acts and things and to use all means necessary and appropriate to make said restrains effective, including the means, acts and things hereinafter more particularly alleged;

21. That one of the purposes of the conspiracy was to procure, monopolize and keep within the control of the defendants herein, to the greatest extent possible and to the exclusion of other persons and corporations, the business of conducting national radio network operations and to suppress competition in all phases of such operations, including competition in securing national radio advertisers; that as a part of said combination and conspiracy the defendants have arranged and agreed among themselves to do and have done the following things:

(a) To require radio stations affiliated with CBS to execute affiliation contracts containing clauses which by their terms have forbidden said broadcasting stations from accepting any programs from any other national network (a typical copy of such contract clause is attached hereto, as "Exhibit B" and made a part hereof);

(b) To refuse to furnish CBS network programs to radio stations not regularly affiliated with CBS even though the regularly affiliated station covering substantially the same area is not broadcasting such programs, thereby preventing many radio listeners from hearing and enjoying CBS network programs that would otherwise be available;

(c) To require radio stations affiliated with CBS to execute affiliation contracts containing so-called option time clauses. Those clauses usually provide that upon 28 days' notice the network may exercise the option to use any part of the affiliated stations' time on the air as the network may

desire. Typical option time clauses are attached hereto marked "Exhibits C and D" and made a part hereof;

(d) To suppress competition among radio networks in the sale to advertisers of time on the air by optioning all of the more desirable time of affiliated stations, which options may be exercised upon 28 days' notice. The value of a program to a radio advertiser depends largely on its continuation for such period of time as to familiarize the listening public with the program, the local station over which it is [fol. 297] broadcast, and the time of the broadcast. The necessary effect, therefore, of such option time contracts has been to prevent any other network from competing with CBS in the furnishing of network programs, or in arranging network broadcasts on behalf of network advertisers to such stations during the stations' time on the air optioned to CBS, even though a substantial portion of the affiliated stations' time optioned to CBS has not been purchased by CBS for the broadcasting of commercial programs;

(e) To suppress competition between CBS and its affiliated radio stations in securing commercial radio advertisers through CBS's practice of optioning of its affiliated stations' time on the air, thereby vesting in CBS rather than in the affiliated stations, the power to make satisfactory commitments with radio advertisers as to the desired portion of the station's time on the air;

(f) To prevent affiliated stations from entering into any commitments with local radio sponsors or advertisers for the more desirable hours for periods longer than 28 days, even though CBS does not exercise its option to use such time;

(g) To suppress competition between CBS and electrical transcription manufacturers in securing commercial radio advertisers for stations affiliated with CBS through exercise by CBS of its option on the affiliated stations' time on the air in such manner as to prevent electrical transcription manufacturers or advertisers desiring to use electrical transcriptions for broadcasting purposes from securing satisfactory commitments as to desired radio time and as to geographic distribution directly with the radio stations affiliated with CBS;

(h) To suppress competition with other network systems in securing network station outlets by requiring affiliated

stations to execute long term contracts. The FCC issues licenses for station operation for periods not longer than two years. The affiliation contracts between CBS and its affiliated stations are for periods of five years or more. The stations affiliated with CBS have been forced to sign these long term contracts because of the dominate position in the broadcasting industry enjoyed by CBS, and because NBC, its chief competitor, forces its affiliated stations to sign similar long term contracts.

[fol. 298] (i) To suppress the development of existing and potential radio network systems, by entering into the aforesaid "tying" affiliation contracts with stations located in substantially all of the more lucrative marketing areas where the number of radio broadcasting stations available for network systems is limited, well knowing that their major competitor, NBC, is pursuing a similar policy;

(j) To acquire complete ownership and control of radio stations located in certain cities and towns in which the number of broadcasting stations having comparable radio facilities is insufficient to permit other national network operations to use exclusively the facilities of one of such stations;

VII

Effect of Conspiracy

22. That the defendants have adopted the means and engaged in the activities aforesaid, with the intent, purpose, and effect of unreasonably and unlawfully suppressing competition in the conduct and development of national radio network systems, and have otherwise unreasonably restrained commerce in radio broadcasting and electrical transcriptions; that their activities aforesaid have prevented unknown thousands of radio listeners from hearing and enjoying radio network programs that otherwise would have been available and have affected the quality of radio network programs which could be expected to flow from a competitive radio broadcasting industry;

23. That the radio stations affiliated with defendants in the operation of national networks have substantial investments of money, credits and property in their businesses and said investments and businesses would be greatly reduced in value or destroyed if defendants, because of their

dominant position in the industry, refused to allow such stations to continue a network affiliation;

24. That the power of defendants, the competitive advantages enjoyed by them, the unreasonable restraints of interstate commerce inherent in the ownership and operation of a national network system and of radio stations located in cities and towns in which there are less than four radio stations with comparable facilities are such that they are subject to abuses which can be corrected only by a severance of these ownerships and controls.

[fol. 299] VIII

Prayer

Wherefore, the complainant prays:

1. That summons issue to each of the defendants, commanding said defendants to appear herein and to answer the allegations contained in this Complaint and to abide by and perform such orders and decrees as the Court may make in the premises;

2. That upon final hearing of this cause, the Court order, adjudge and decree that the conspiracy and wrongs herein described exist and constitute an unreasonable restraint of trade and commerce among the various states and the District of Columbia;

3. That a receiver be appointed to receive forthwith any stock and share capital owned by Columbia Broadcasting System or any officers thereof, which represents the ownership of radio stations located in cities and towns in which there are less than four radio stations with comparable facilities, and that defendants be thereupon ordered forthwith to transfer the aforesaid stock and share capital to the aforesaid receiver; that the aforesaid receiver upon receiving the aforesaid stock and share capital offer such operations for sale and sell the same, holding the proceeds subject to the order of the Court; that in the event there is no stock and share capital of a severable nature representing ownership of the above named radio stations, the Court require defendants to sever their ownership, operation and control of said radio stations and otherwise enjoin the operation of same by defendants in such manner and form as the Court shall deem just and proper;

4. That the defendants and each and all of their respective officers, managers, agents, employees, and all persons acting or claim to act on behalf of defendants be enjoined and restrained from entering into any contract, agreement, conspiracy, or otherwise to do the following acts and things:

(a) To exercise any right or power to prevent affiliated radio stations from accepting any program from any other network during such stations' time on the air which is not being used by defendants;

[fol. 300] (b) To refuse to furnish CBS network programs to radio stations covering substantially the same area as the regularly affiliated stations, in a non-discriminatory manner, when the regularly affiliated station does not broadcast such programs;

(c) To prevent or hinder the affiliated stations from scheduling programs before the defendants finally agree to use the time during which such programs are scheduled, or from requiring the station to clear time already scheduled for use, either through the medium of live talent or electrical transcriptions, when the defendants seek to use the time;

(d) To enter into or assert any contract of affiliation with any radio station for a period longer than two years;

5. That the complainant recover the costs and disbursements of this suit;

6. That the complainant shall have such other and further relief as the Court shall deem just and proper.

Victor O. Waters, Special Assistant to the Attorney General. ——— ———, Attorney General. ——— ———, Assistant Attorney General. ——— ———, United States Attorney.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No.

UNITED STATES OF AMERICA

v.

COLUMBIA BROADCASTING SYSTEM, WILLIAM S. PALEY, EDWARD KLAUBER and HERBERT V. AKERBERG

Affidavit

VICTOR O. WATERS, being duly sworn, says:

I am a Special Assistant to the Attorney General and have been actively engaged in the conduct of the investigation and other work on behalf of the complainant in connec- [fol. 301] tion with this proceeding. I have read the Complaint herein and know the contents thereof and am informed and verily believe the allegations therein to be true. The sources of my information and the grounds of my belief are the statements and correspondence of various officials of radio broadcastinug stations, radio network systems and manufacturers of electrical transcription records; the statements and official reports of Government investigators, records and evidence assembled by the Federal Communications Commission, and correspondence, memoranda, statements and agreements of the defendants.

Victor O. Waters, Special Assistant to the Attorney General.

Subscribed and sworn to before me this — day of —, 19. —— ——, Notary Public, District of Columbia.

EXHIBIT "A" TO COMPLAINT

Summary of Metropolitan Districts in the United States Having a Population in Excess of 50,000, Having Three or Less Full-Time Commercial Stations and Showing the Population and Total Number of Full-Time Commercial Stations in Each

Three full-time commercial stations

Metropolitan District	Population	Total number of full-time commercial stations
Cleveland, O.	1,214,943	3
Milwaukee, Wis.	790,336	3
Houston, Tex.	510,397	3
Rochester, N. Y.	411,970	3
Birmingham, Ala.	407,851	3
Youngstown, O.	372,428	3
Akron, O.	349,705	3
Worcester, Mass.	306,194	3
Omaha-Council Bluffs, Nebr.-Ia.	287,698	3
San Diego, Cal.	256,368	3
Miami, Fla.	250,537	3
Richmond, Va.	245,674	3
Nashville, Tenn.	241,769	3
Salt Lake City, Utah	204,488	3
[fol. 302] Jacksonville, Fla.	195,619	3
Chattanooga, Tenn.	193,215	3
Tulsa, Okla.	188,562	3
Des Moines, Ia.	183,973	3
Duluth-Superior, Minn.-Wis.	157,098	3
Knoxville, Tenn.	151,829	3
Beaumont-Port Arthur, Tex.	138,608	3
Wichita, Kans.	127,308	3
Little Rock, Ark.	126,724	3
Phoenix, Ariz.	121,828	3
Shreveport, La.	112,225	3
Springfield, Mo.	70,514	3

Two full-time commercial stations

Columbus, O.	365,796	2
Toledo, O.	341,663	2
Lowell-Lawrence-Haverhill, Mass.	334,969	2
Allentown-Bethlehem-Easton, Pa.	325,142	2
Norfolk-Portsmouth-Newport News, Va.	323,326	2
Fall River-New Bedford, Mass.	272,648	2
Dayton, O.	271,513	2
Bridgeport, Conn.	216,621	2
Grand Rapids, Mich.	209,873	2
Wheeling, W. Va.	196,340	2

Metropolitan District	Population	Total number of full-time commercial stations
Wilmington, Del.	188,974	2
Davenport-Rock Island-Moline, Ia.-Ill.	174,995	2
Harrisburg, Pa.	173,367	2
Huntington-Ashland, W. Va.-Ky.	170,979	2
Sacramento, Cal.	158,999	2
Waterbury, Conn.	144,822	2
Evansville, Ind.	141,614	2
Charleston, W. Va.	136,332	2
Fort Wayne, Ind.	134,385	2
Erie, Pa.	134,039	2
Savannah, Ga.	117,970	2
El Paso, Tex.	115,801	2
Mobile, Ala.	114,906	2
Charlotte, N. C.	112,986	2
Roanoke, Va.	110,593	2
[fol. 303] Winston-Salem, N. C.	109,833	2
Portland, Me.	106,566	2
Atlantic City, N. J.	100,096	2
Charleston, S. C.	98,711	2
Fresno, Cal.	97,504	2
Montgomery, Ala.	93,697	2
Columbia, S. C.	89,555	2
Springfield, Ill.	89,484	2
Lincoln, Nebr.	88,191	2
Jackson, Miss.	88,003	2
Augusta, Ga.	87,809	2
Sioux City, Ia.	87,791	2
Manchester, N. H.	81,932	2
Asheville, N. C.	76,324	2
Macon, Ga.	74,830	2
Corpus Christi, Tex.	70,677	2
Amarillo, Tex.	53,463	2
One full-time commercial station		
New Haven, Conn.	308,228	1
Canton, O.	200,352	1
Trenton, N. J.	200,128	1
Utica-Rome, N. Y.	197,128	1
Flint, Mich.	188,554	1
Reading, Pa.	175,355	1

Metropolitan District	Population	Total number of full-time commercial stations
Peoria, Ill.	162,566	1
Saginaw-Bay City, Mich.	153,388	1
Johnstown, Pa.	151,781	1
South Bend, Ind.	147,022	1
Binghamton, N. Y.	145,156	1
Racine-Kenosha, Wis.	135,075	1
Lancaster, Pa.	132,037	1
San Jose, Cal.	129,367	1
Altoona, Pa.	114,094	1
Lansing, Mich.	110,356	1
Austin, Tex.	106,193	1
Rockford, Ill.	105,259	1
York, Pa.	92,627	1
Columbus, Ga.	92,478	1
[fol. 304] St. Joseph, Mo.	86,991	1
Berkeley, Cal.	85,547	1
Terre Haute, Ind.	83,370	1
Stockton, Cal.	79,337	1
Madison, Wis.	78,349	1
Topeka, Kans.	77,749	1
Springfield, O.	77,406	1
Kalamazoo, Mich.	77,213	1
Cedar Rapids, Ia.	73,219	1
Greensboro, N. C.	73,055	1
Galveston, Tex.	71,677	1
Waco, Tex.	71,114	1
Durham, N. C.	69,683	1
Decatur, Ill.	65,764	1
Pueblo, Colo.	62,039	1
No full-time commercial stations		
Hamilton-Middletown, O.	112,686	0
Waterloo, Ia.	67,050	0

EXHIBIT "B" TO COMPLAINT

Typical Exclusive Clause Preventing Station From Using Other Networks

"It is agreed that during the term of this contract the station will not, without the specific consent in writing of

Columbia, permit the use of its facilities by any other broadcasting chain or network; that without such consent it will not receive programs from or forward programs to any other station, group of stations, chain, or network; and that without such consent it will not, directly or indirectly, through an agency, representative, or otherwise, sell its facilities for use along with the facilities of any other station or stations as a group."

[fol. 305] EXHIBITS "C" AND "D" TO COMPLAINT

Typical Option Time Clauses of CBS.

"The Station agrees to furnish the facilities of its station to Columbia for all commercial programs and undertakes to accept and broadcast all such commercial programs offered to it by Columbia, at whatever day or hour, during the time when the Station is licensed to operate."

"The Station will broadcast all network sponsored programs furnished to it by Columbia during the time when the Station is licensed to operate; provided, however, that except in connection with occasional sponsored programs of special events (such as World Series broadcasts) during periods of not more than two weeks each, the Station need not in any week broadcast network sponsored programs totaling more than fifty 'converted hours' (as defined below, but for this purpose computed during the entire term of this agreement on the basis of the difference in rates at different hours specified in Columbia's Rate Card No. 23."( )

( ) A "converted hour" is defined in the contract as follows:

"A 'converted hour' means an aggregate period of one hour during which there shall be broadcast over the Station one or more network sponsored programs for which Columbia shall charge its full night-time card rate for the station. An aggregate period of one hour during which there shall be broadcast over the Station one or more network sponsored programs for which Columbia shall charge a fraction of its night-time card rate, such as its daytime card rate, shall be the equivalent of the same fraction of a 'converted hour.' Fractions of an hour shall for all purposes be treated as their fractional proportions of full hours at the same time of the day."

[fol. 306] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HERBERT V. AKERBERG

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

HERBERT V. AKERBERG, being duly sworn, deposes and says:

1. I am a Vice-President of Columbia Broadcasting System, Inc. (hereinafter called "Columbia") in charge of station relations, and have been employed in this capacity since 1936. From 1933 to 1936 I was General Manager of this department and my duties were substantially what they are now. I have been employed by Columbia since 1929. I have heretofore made an affidavit in support of Columbia's Motion for Preliminary Injunction herein, said affidavit having been verified October 29, 1941.

2. The payments by Columbia to its affiliated stations (excluding stations owned or leased by Columbia) as compensation for the broadcasting of network commercial programs during the accounting years 1931 through 1940 and during the first 10 months of 1941 have represented, with the exception of the year 1938, ever-increasing percentages of the amounts received by Columbia from advertisers and advertising agencies (after deducting applicable discounts and agency commission) for the broadcasting of network commercial programs over such stations. The trend of the percentage of the amounts so received by Columbia paid to affiliated stations is shown in the table below in which the percentage for 1931 is expressed as 100:

1931	100
1932	127
1933	142
1934	171
1935	185
1936	192
1937	197
1938	181
1939	201
1940	211
1941 (10 months)	222

[fol. 307] The foregoing index figures have been computed without giving effect to payments made by some stations to the network on account of the expense of connecting the station to the network. As these payments were greater, both in the aggregate and proportionately, in 1931 than in 1940 or 1941, adjustment of the figures above to reflect deduction of such wire cost from the amount of station compensation would result in showing an even sharper rate of increase in the stations' share of network revenues.

3. As of the date of this affidavit, 113 stations (exclusive of the eight operated by Columbia) are affiliated with the Columbia network. Contracts with 106 of such stations provide for a term (either in the original contract or a subsequent modification) in excess of two years. As used in this affidavit the "term" of an affiliation agreement means the original term of such agreement (whether or not such term may be shortened, or might have been shortened, by Columbia by exercise of a right of cancellation) plus the aggregate of all renewal periods, if any, by which the term of the contract may be extended, or might have been extended, at the option of Columbia.

4. The provision of the form of contract set forth in Exhibit A to the complaint, giving Columbia an option to terminate on twelve months' notice, has been omitted from the contracts for 44 of the 106 stations whose contracts provide for a term in excess of two years. With three exceptions noted below, the contracts for such 44 stations give no right of cancellation by Columbia, other than the usual right specified in the contracts to cancel on 60 days' notice if, as a result of a change in the power, frequency, time or manner of operation of the station, the value of the station as an outlet for Columbia network programs is substantially lessened. The contracts for such 44 stations contain no provision giving Columbia an option to extend the original term of such contracts.

One of such contracts provides that Columbia may terminate if station WABC operates with 500,000 watts. Another provides that Columbia may terminate if Columbia has an opportunity to affiliate with a 50,000 watt station in the area served by the station to which the contract refers. A third contract provides that Columbia may terminate if Columbia has an opportunity to affiliate with a 50,000 watt station is a designated area; such right of cancellation may

[fol. 308] not be exercised, however, if the station to which the contract refers is itself licensed to operate and is operating with 50,000 watts within a designated time.

Of the contracts for the 44 stations above referred to from which the provision for termination on twelve months' notice has been omitted, those for 26 stations are for a term of five years or more and were made for the five year, or longer, term at the specific request of the respective stations. Nine of such stations requested a five year or longer affiliation contract because they had an opportunity to increase their power or improve their plants, or both, and were unwilling to make the large capital expenditure involved without assurance that they would receive Columbia network sustaining and commercial programs for a period of years. Seventeen of such stations requested the five year or longer affiliation contract because they believed that the assurance that they would receive Columbia network sustaining and commercial programs for a period of years would contribute to stability of station operations. The contract for one of these stations which is for a term in excess of five years, but which may be terminated by Columbia in the event that the station is not operating with 50,000 watts on the frequency specified in the contract within the time limit specified by Columbia, becomes non-cancellable when the station is so operating and was made for the long term at the request of the station so that it would be assured of Columbia network sustaining and commercial programs for a period of years in the event that the station is able to begin operating with 50,000 watts during the specified time limit.

5. One of the purposes of my prior affidavit above referred to was to show that because of the order complained of Columbia has received letters from numerous of its affiliates (copies of many of which are annexed to said affidavit as exhibits) cancelling or repudiating, or threatening to cancel or to refuse to perform, their affiliation contracts.

On October 31, 1941, William S. Paley, President of Columbia, sent to each Columbia affiliate a wire, a copy of which is annexed hereto as Exhibit A, informing affiliates that on the day before Columbia had filed a bill in equity in the Federal Court seeking to enjoin the Federal Communications Commission from putting into effect the regulations promulgated by the order complained of. On Octo-

[fol. 309] ber 31, 1941, the Commission issued its so-called "Minute" (a copy of which is Appendix D to Government's brief) which purported to assure affiliates that if they wished to contest the validity of the regulations in proceedings before the Commission they would be allowed to remain on the air pending the proceedings and any appeal. On November 6, 1941 Edward Klauber, Executive Vice President of Columbia, sent to each Columbia affiliate a letter, a copy of which is annexed hereto as Exhibit B, together with a copy of a public statement made by Columbia, a copy of the complaint, and a copy of the affidavit of Mr. Paley herein, sworn to October 30, 1941. The public statement stated, among other things, that Columbia had moved in the Federal Court to prevent the Federal Communications Commission from putting its new regulations into effect on November 15th and that "The relief sought by Columbia is a court order which would suspend the new rules pending a trial of the issues before a three-judge statutory court". On November 12, 1941 I sent to each Columbia affiliate a telegram, a copy of which is annexed hereto as Exhibit C, informing affiliates that by court order in conformity with a stipulation between counsel the regulations had been suspended in their entirety until after the hearing and decision of Columbia's motion.

Since the issue on October 31, 1941 of the Commission's Minute referred to above, Columbia has continued to receive indications that its affiliates would cancel, repudiate or refuse to perform their affiliation contracts and refuse to renew such contracts, and Columbia has received no indication that the Minute has had or will have the effect of inducing stations to assume the burden of themselves testing the validity of the regulations in hearings before the Commission and subsequent appeals. In fact, since the issue of the Minute Columbia has received from five affiliates letters cancelling or repudiating affiliation contracts or indicating an intention not to continue to be bound thereby. Copies of these letters are annexed hereto as Exhibits D, E, F, G and H. I believe that Columbia would have received more letters of this sort since October 31, 1941 had it not been for the circulation by Columbia, in the telegrams and letter referred to above, of information of the pendency of Columbia's suit and motion for preliminary injunction, and the stipulation and order suspending the regulations pending hearing and decision thereon.

[fol. 310] After the making of the order of November 12, 1941, Columbia resumed the negotiations with stations for renewal of their affiliation contracts, which negotiations had been terminated as a result of the Commission's regulations as stated at pages 3 and 4 of my affidavit of October 29, 1941, and renewals of several of such contracts have been obtained on substantially the same terms as provided in the old contracts.

Herbert V. Akerberg.

Subscribed and sworn to before me this 5th day of January, 1942. George A. Burwell, Notary Public. N. Y. Co. Clk's No. 527, Reg. No. 3B800; Kings Co. Clk's No. 119, Reg. No. 3459; Bronx Co. Clk's No. 62, Reg. No. 248B43; Queens Co. Clk's No. 2167, Reg. No. 8330; Certificates filed in Westchester and Richmond Counties. Commission expires March 30, 1943. (Seal.)

EXHIBIT "A" TO AFFIDAVIT OF HERBERT V. AKERBERG

October 31, 1941.

To the affiliates of the Columbia Broadcasting System, Inc.:

Yesterday, Columbia in a bill of Equity filed in the Federal Court, asked that the Federal Communications Commission be enjoined from putting into effect the new chain broadcasting rules. Columbia stated that the action of the Commission was arbitrary and without any basis in law, and would be destructive to the American broadcasting industry.

Columbia has insisted ever since the rules were first promulgated, that the exercise of vague and ill-defined powers by the Commission would have a very intimidating effect on the industry, and that such powers would act as a direct threat to freedom of the air.

Columbia will prosecute the suit vigorously and, at the same time, continue its efforts for the enactment of a new radio law which will recognize the present status of the radio art and the important part networks now play in American broadcasting; also a law which will clearly spec- [fol. 311] ify the powers of the Commission and thus safeguard the interests of broadcasters and the public alike.

We feel that this court proceeding is not only for Columbia's best interests, but also for the protection of every broadcaster in America and the great listening public.

We will keep you informed of further developments.

William S. Paley.

EXHIBIT "B" TO AFFIDAVIT OF HERBERT V. AKERBERG

Columbia Broadcasting System, Inc.

485 Madison Avenue

New York

Office of The Executive Vice President, Edward Klauber

November 6, 1941.

Supplementing Mr. Paley's telegram to you of October 31, I am sending you herewith a copy of the public statement made by us when we went into the Federal Court in an effort to enjoin the FCC from enforcing its regulations and for your fuller information, a copy of our complaint and of an affidavit by Mr. Paley filed therewith.

Sincerely yours, Edward Klauber.

EXHIBIT "C" TO AFFIDAVIT OF HERBERT V. AKERBERG

Copy

Columbia Broadcasting System, Inc.

Private Wire

Date November 12, 1941.

To Affiliated Stations:

The United States District Court in New York today ordered, in conformity with a stipulation between counsel for the FCC and ourselves, that the Chain Broadcasting Order [fol. 312] and Regulations be suspended in their entirety until after the hearing and decision on our motion for an injunction. The hearing date for this motion and on motions made by FCC counsel has been postponed until De-

cember fifteenth. We are happy to report this development to you in line with our promise to keep you advised.

Herb. Akerberg.

EXHIBIT "D" TO AFFIDAVIT OF HERBERT V. AKERBERG

Illinois Broadcasting Corporation

Quincy, Illinois

November 7, 1941.

Columbia Broadcasting System, Inc., 485 Madison Avenue, New York City, New York.

GENTLEMEN:

The Illinois Broadcasting Corporation, owner and operator of Radio Station WTAD, at Quincy, Illinois, has at all times complied with the rules and regulations of the Federal Communications Commission and desires and expects to continue to do so.

You are hereby notified that the contract entered into on November 15, 1940 by and between Columbia Broadcasting System, Inc. and Illinois Broadcasting Corporation insofar as said contract is in conflict with or fails to comply with the orders, rules and regulations of the Federal Communications Commission effective as of date November 15, 1941, or insofar as said contract fails to comply fully with said orders, rules and regulations of the said Federal Communications Commission is hereby declared abrogated and null and void. This action on the part of Illinois Broadcasting Corporation is made for the purpose of complying with the orders, rules and regulations of the Federal Communications Commission and is in accord with the terms and provisions of Paragraph 9 of said contract with you of date November 15, 1940, the provisions of said Paragraph 9 being as follows:

"The obligations under this agreement are subject to all applicable laws, rules and regulations, present and future, [fol. 313] especially including rules and regulations of the Federal Communications Commission."

Respectfully, Illinois Broadcasting Corporation,
(Sgd.) by Emery Lancaster, President. Studios
W. C. U. Building.

EXHIBIT "E" TO AFFIDAVIT OF HERBERT V. AKERBERG

W L A W

Columbia's Voice In Northern New England

Operated By Hildreth & Rogers Co.

Studios: 278 Essex Street

Lawrence, Massachusetts

November 8, 1941

Herbert V. Akerberg, Vice Pres., Columbia Broadcasting System, Inc., 485 Madison Avenue, New York, N. Y.

DEAR MR. AKERBERG:

In view of the new rules and regulations recently issued by the Federal Communications Commission and confirmed by their order, we would like to arrange a conference at your earliest convenience between your organization and ourselves, in order to adjust our contractual relationship to comply with the above.

It is our understanding that this should be completed before November 15th.

Very truly yours, A. H. Rogers (sgd.), Pres. & Treas.

AHR/h

[fol. 314] EXHIBIT "F" TO AFFIDAVIT OF HERBERT V. AKERBERG

Radio Station WBAB

Owned and Operated By The Press-Union Publishing Co.

Atlantic City, New Jersey

November 13, 1941.

Mr. Edward Klauber, Vice-President, Columbia Broadcasting System, 485 Madison Avenue, New York, N. Y.

Re: F. C. C.'s Chain Monopoly Regulations

To Become Effective November 15, 1941

DEAR MR. KLAUBER:

We purposely delayed writing you regarding the Federal Communications Commission's so-called chain-monopoly

regulations, scheduled to become effective November 15th (and how these regulations will affect our contract with the Columbia Broadcasting System) in the hope that the matter would be amicably adjusted between the Commission and the networks, or that the matter would perhaps be delayed by the courts, temporarily at least, to give the networks and their affiliates an opportunity to gradually adjust their operations to comply with the new regulations.

We note that you have applied to the courts for an injunction but nothing having developed up to the present moment, we find it necessary, very much to our regret, to request that you arrange to submit to us a new contract, covering a period of not longer than two years and to be worded in accordance with the new regulations.

As you know, Section 9 of our present contract sets forth that all of our agreements with you are subject to the rules and regulations of the Federal Communications Commission which would, it seems to us, automatically take care of the situation created by the new F. C. C.'s new chain monopoly regulations. However, the contract is for a five-year period, with three years still to run from January 23rd, 1942. We regret very much the necessity for making this request, but it is a situation over which we have no control and we sincerely trust that something may develop to adjust this [fol. 315] situation before the new rules and regulations are scheduled to become effective.

Very truly yours, Press-Union Publishing Company, Owners and Operators of Station WBAB. Albert J. Feyl (sgd) President.

AJF:H.

EXHIBIT "G" TO AFFIDAVIT OF HERBERT V. AKERBERG

KLRD, Dallas.
50,000 Watts, 1080 Kilocycles.

The Times Hear-ld Station—Columbia Broadcasting System

Office and Studios, Adolphus Hotel, Dallas

November 19, 1941.

Columbia Broadcasting Company, New York City

GENTLEMEN:

It is our understanding that The Federal Communications Commission issued on May 2, 1941, regulations relat-

ing to contracts between standard broadcast stations and network organizations, which regulations were amended October 11, 1941, and were made effective November 15, 1941. We understand that some temporary order or stipulation has been entered delaying the enforcement of the regulations pending a hearing upon various petitions for preliminary inju-ctions. We do not know just what the effect of such order or stipulation may be or how long it will remain in force, but assume that you are fully advised and will know whether or not and to what extent such order affects the situation. At all events, we feel that we must notify you that if and when the regulations become effective the existing contract between Columbia Broadcasting Company and KRLD Radio Corporation will be considered by us as subject to all valid regulations of the Commission.

Very truly yours, KRLD Radio Corporation, by Albert A. Swinsky, Jr. (Sgd.)

[fol. 316] EXHIBIT "H" TO AFFIDAVIT OF HERBERT V. AKERBERG

KOMA, Oklahoma City's CBS Station.

Owned and Operated by Koma Incorporated

Biltmore Hotel, Phone 2-3291

December 20, 1941.

Registered Mail

Mr. Herbert V. Ackerberg, Columbia Broadcasting System, Inc., 485 Madison Avenue, New York, New York.

DEAR SIR:

This is to notify you that in view of Paragraph 9 in our agreement with the Columbia Broadcasting System, Inc., which provides that the contract shall be subject to all applicable rules and regulation, present and future, of the Federal Communications Commission, we construe our contractual relations with Columbia to have been modified so as to comply with the new network rules of the Commission to the extent that said contract may be inconsistent, or in conflict, with the provisions of said Rules.

Yours very truly, Bryan Mathes (Sgd.) Secretary-Treasurer.

Bryan Mathes/j.

IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRANK STANTON

UNITED STATES OF AMERICA,
Southern District of New York
City, County and State of New York, ss:

FRANK STANTON, being duly sworn, deposes and says:

I am the Director of Research of Columbia Broadcasting System, Inc. (hereinafter sometimes called "CBS" or "Columbia") and I have been its Director of Research since November, 1938. I am also a member of the Advisory [fol. 317] Board of the Office of Radio Research of Columbia University and a Consultant to the Office of Facts and Figures, Washington, D. C. I am fully familiar with the records of the operations of Columbia and with records and statistical material and methods relating to the scientific measurement of program preferences of listeners and habits of radio listening. During the period, 1937-1940, I was Associate Director of the Office of Radio Research, Princeton University. Prior to joining CBS in 1935 I was a member of the faculty of Ohio State University for four years. As partial fulfillment of the requirements for my Ph.D. degree, in the field of industrial psychology, I conducted original research in the field of radio listening habits through the first use of electrical recorders which measured actual radio receiver operation automatically.

This affidavit relates to:

A. Broadcasting of network sustaining programs by Columbia network stations.

B. Public dependence upon radio as a news source.

The analyses hereinafter described under Division A were conducted by my department in CBS and under my supervision. As to Division B, I am well acquainted with the research organizations and individuals, and am familiar with the research procedures and the particular research projects referred to. Such research procedures are generally recognized and accepted by the radio industry as gauges of listener habits or preferences.

A. Broadcasting of Network Sustaining Programs by Columbia Network Stations

1. Available CBS Network Sustaining Programs Broadcast by CBS Network Stations.

The CBS network stations broadcast the majority of the CBS sustaining programs available to them. From among those available they select those which fit their own time schedules and their own program needs. Obviously, the volume of such programs offered by Columbia must be much larger than if the needs of all stations were identical at all times.

An analysis of the sustaining program acceptance reports by CBS network stations for four typical weeks in 1941 [fol. 318] shows the following average percentages of use of all available network sustaining programs by the network stations:

Week of	Percent of Available Network Sustaining Programs which were broadcast
February 2-8, 1941	57.1%
May 4-10, 1941	56.4
August 3-9, 1941	60.0
November 2-8, 1941	52.9
Average	56.7% [1]

Many of the network sustaining programs are made available to groups of network stations, rather than to all stations on the network. This is due, primarily, to two factors: first, the time differentials between different sections of the country which result in the offering of network sustaining programs to stations in one section when stations in another section are not in operation; and second, the fact that network sustaining programs are offered to stations in geographical groups at the same time that network commercial programs are being carried by stations in other geographical groups. The latter practice is followed in order to provide insofar as practicable with present program transmission facilities, each network station with a substantial volume of network service each day. There are deviate cases where,

[1] Stations on the CBS Network broadcast an average of slightly less than five hours a day of network sustaining programs during the above four typical weeks.

because certain program transmission lines are occupied with the transmission of network commercial programs, it is impracticable to supply other stations joined to the network by those lines with sustaining programs when they are not scheduled to receive the network commercial programs.

2. Broadcasting of Available CBS Network News and Cultural Sustaining Programs.

The CBS network sustaining programs in the four typical weeks in 1941 referred to before (*i.e.*, the weeks of February 2-8, May 4-10, August 3-9 and November 2-8) have been further analyzed to segregate the network sustaining programs devoted to news and news analysis and the programs [fol. 319] of cultural appeal. The average percentage of available network sustaining programs in each category which were broadcast by the stations is as follows:

Week of	Percent of Available Network Sustaining *News Programs* Which Were Broadcast	Percent of Available Network Sustaining *Cultural Programs* Which Were Broadcast
February 2-8, 1941	74.5%	65.5%
May 4-10, 1941	71.8	58.6
August 3-9, 1941	71.5	66.1
November 2-8, 1941	67.0	61.9
Average	71.0%	63.2%

The above percentages for news (71.0%) and cultural programs (63.2%) are higher than the average availability-acceptance ratio for all CBS sustaining programs (56.7%).

Not only is the time for many of these programs, which otherwise might be sold for commercial programs, set aside and withheld from sale by CBS, but the expense of preparation and talent is borne entirely by Columbia.

Included in CBS sustaining cultural programs are broadcasts of the New York Philharmonic-Symphony Orchestra, the Indianapolis Symphony Orchestra, the Cincinnati Conservatory of Music, the Columbia Concert Orchestra, and the Salt Lake Tabernacle Choir. Others include "Church of the Air", "Columbia Workshop", "The School of the Air of the Americas", "Invitation to Learning", "Of Men and Books", "The People's Platform", "Young Americans in the Making", and "Let's Pretend".

3. Broadcasting of CBS Network Sustaining Programs of Special Events.

Attached hereto as Exhibit A is a list of thirty outstanding special events programs broadcast as sustaining features of the Columbia network during 1941. During this 12 month period, Columbia's scheduling of special events programs reflected the overshadowing importance of national and international events and the rapidly expanding interest of listeners in these developments. The thirty special events broadcasts listed in Exhibit A were accepted and broadcast by an average CBS network of 106 stations [fol. 320] or 88% of all the stations on the network.[2] This compares with the average of 56.7% acceptance and broadcast of available sustaining programs of all types, referred to above.

B. Public Dependence on Radio as a News Source

1. Reliance of the Public on Newspapers and Radio for News.

The usefulness of radio in the dissemination of news is reflected primarily by the extent to which people *depend* upon the radio for the news. A survey made by Elmo Roper for Fortune Magazine in 1938[3] in which this question was

[2] No adjustment has been made in computing the percentage figure because of time differentials and licensed operating schedules of certain stations or other factors which may have made it impossible for any station to broadcast any of these programs.

[3] Elmo Roper, 30 Rockefeller Plaza, New York City.

Elmo Roper, along with Dr. George Gallup, is one of the pioneers in the scientific sampling and measurement of public opinion. In addition to conducting the Fortune surveys of public opinion, which reported the most accurate of all national pre-election forecasts in 1936 and 1940, Roper maintains a nationwide field force to handle specific studies of media circulation, advertising effectiveness, public attitudes and special management problems.

The Fortune polls, from which data in this affidavit are quoted, are based on personal interviews with a representative cross-section of 3,500-5,000 individuals distributed throughout the United States according to the principles of scientific sampling. Each geographic section, income group, age group, sex group and education group receives the proper proportion of interviews based on the total U. S. population characteristics. In other words, each of Roper's nationwide samples is a minature of the total U. S. population.

asked, "From which one source do you get most of your daily news—the newspapers or radio news broadcasts?", disclosed that 45.2% of the people obtained their news from newspapers, and 23.5% from radio.

A similar study—involving the same technique, the same question and the same research organization—made three [fol. 321] years later in 1941 disclosed an increasing dependence by the public upon the radio for news. Whereas the percentage that relied primarily upon newspapers dropped from 45.2% to 31.2%, the percentage of those who obtained news from radio rose from 23.5% to 39.4%.

The results of the later study showed the following trends by socio-economic groups.

	U. S. Average	Prosperous	Upper Middle	Lower Middle	Poor
Radio	39.4%	30.2%	33.3%	40.8%	45.4%
Newspapers	31.2	36.3	33.0	31.0	27.8
Both	26.2	33.2	33.0	25.9	22.0

It is significant that in the two lower socio-economic groups, involving approximately two-thirds of the population, there is substantially greater dependence on the radio as a source of daily news.

An explanation of the increased dependence on radio as a source of news is to be found in the answers to auxiliary questions asked in the same studies by Elmo Roper. First, those persons who said they got most of their daily news from radio were asked, "Why do you prefer the radio?". The replies were as follows:

Get news more quickly	28.4%
Takes less time to find out what is going on	19.5
More interesting and entertaining	11.9
Just don't read newspapers	7.6
Radio fairer than newspapers	6.9
Radio more complete than newspapers	6.6
Newspapers more confusing	4.3
No mistakes on radio	3.3
Work and listen at same time	2.8
Easier	1.6
Cheaper	1.2

Second, in answer to the question, "Which of the two—radio or newspapers—gives you the news more quickly?", the replies were:

Radio	83.0%
Newspapers	12.9

[fol. 322] Third, in answer to the question: "Which of the two—radio or newspapers—gives you news freer from prejudice?", the replies were:

Radio	49.7%
Newspapers	17.1

Thus, speed and reliability are two factors responsible for the public's high appraisal of radio as a news source.

Radio's reputation as a reliable news source was even more sharply revealed in the Fortune study of 1938 when this question was asked:

"If you heard conflicting versions of the same story from these sources, which would you be most likely to believe?"

The answers showed the following results:

A radio press bulletin	22.7%	40.3%	(Radio)
A radio commentator	17.6		
An authority you heard speak	13.0		
An editorial in a newspaper	12.4	26.9	(Press)
A news item in a newspaper	11.1		
A columnist in a newspaper	3.4		
Depends on paper, writer, speaker	11.6		
Don't know	8.2		

On the basis of this report, radio has a 50% higher factor of credibility in the public mind than newspapers.

2. Radio News and the Lower Income Groups.

The 1941 Roper study previously referred to shows the increased dependence on radio as a news source by those in the lower income groups as compared with those in the higher income groups.

Supporting evidence of this trend is found in a study made by the Office of Radio Research of Princeton Uni-

versity[4] in 1939. The object of the study was to determine [fol. 323] whether radio's usefulness to the public varied with the economic status of the listeners. In personal interviews, a representative sample of 5,528 persons were asked "What is your regular source of news? If more than one, which do you prefer?" The answers disclosed that, in the upper income group only 4.9% depended upon radio alone as a source of news and 38.4% preferred radio to newspapers, while in the middle income group the percentage of those who used radio as an exclusive news source was 7.8%, and of those who preferred radio to newspapers was 50.9%. In the lower income group, however, it was found that 15.0% depended *exclusively* upon radio for news, and 55.6% preferred radio to newspapers.

3. Urban and Rural Dependence on Radio News.

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[4] Office of Radio Research

This office is now at Columbia University, being the continuation of a radio research project begun at Princeton University in the Fall of 1937 and is supported by a grant from the Rockefeller Foundation. The objective of the office is to develop methods of listener research which will contribute to an understanding of the role played by radio for different groups of listeners in the United States.

Several outstanding contributions, both in techniques and analysis, have come from this non-profit research enterprise in the field of communications. The work of the office has included several major studies and numerous minor ones which have been reported from time to time in the scientific journals and more recently in book form ("Radio and the Printed Page" by Paul F. Lazarsfeld, "Radio Research 1941" edited by Paul F. Lazarsfeld and Frank Stanton).

The Office of Radio Research is under the full-time direction of Dr. Paul F. Lazarsfeld, who has an Advisory Board composed of the following members: Dr. Robert S. Lynd, Chairman, Professor of Sociology, Columbia University, Dr. Lyman Bryson, Professor of Education, Teachers College, Columbia University, Dr. Herbert Brucker, Professor of Journalism, Columbia University, Dr. Frank Stanton, Director of Research, Columbia Broadcasting System and Dr. Samuel A. Stouffer, Professor of Sociology, University of Chicago.

The Princeton University study recorded also the preference of urban and rural dwellers for radio as a source of news. In cities over 100,000, radio was preferred by 45.6% as a source of news, whereas in rural areas (farms and towns of 2,500 or less), 55.8% preferred to learn the news by radio.

[fol. 324] Further evidence of the interest of the rural population of America in radio news was reflected in a study made in 1941 by Dr. H. B. Summers [5] in the state of Kansas where the population is predominantly rural. Seven thousand representative listeners were interviewed and asked to select, from a list of 16 general types of programs, the five types which he or she liked best. The table below summarizes the answers to these questions presenting the figures separately for urban and rural (farms and towns of 2,500 or less) listeners;

	Urban	Rural
News broadcasts	72.4%	79.6%
Comedians	63.6	57.2
Audience participation	51.8	48.9
Popular music	47.7	32.7
Variety shows	40.0	34.6

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[5] Dr. H. B. Summers, Kansas State College, Manhattan, Kansas

Dr. H. B. Summers at the present time is acting director of the Public Service Division of the National Broadcasting Company. Before this, Dr. Summers was Chairman of the Department of Speech and Radio at Kansas State College, Manhattan, Kansas. While at the university Dr. Summers conducted annual studies of radio listening in the States of Kansas and Iowa each spring beginning at 1937. These studies represented the first published statewide investigations of habits and preferences of radio listeners.

The studies, conducted by trained investigators by means of personal interviews, have followed the same general pattern each year. Approximately 7,000 interviews were made annually with representative families throughout the state distributed in proportion to population.

The questions asked in these annual studies concerned ownership of radios, station listening habits, audience availabilities, preferences for specific programs and preferences for general program types.

	Urban	Rural
Oldtime music	20.6	34.7
Sports broadcasts	23.3	17.1
Complete drama	33.3	27.8
Market reports	5.6	30.9
Religious music	26.6	31.2
Serial drama	30.2	32.3
Band music	19.9	19.0
Talks, comment	18.4	14.2
Classical music	24.7	11.0
Devotionals	13.7	16.8
Talks on farming	4.0	11.4

[fol. 325] In the 1941 study by Elmo Roper, previously referred to, the responses of rural and urban dwellers to the question, "From which one source do you get most of your daily news—the newspapers or radio news broadcasts?", were analyzed, and the results are shown in the following table:

	Urban	Rural
Radio	36.6%	43.0%
Newspapers	34.2	27.3
Both	26.9	25.2

These three studies not only confirm the importance of radio as a source of news, but demonstrate that among rural listeners, as distinct from urban listeners, the margin of the preference for radio is significantly wider.

4. The Elmer Davis Audience.

The over-all popularity of news broadcasts is demonstrated by the size of the audiences who listen to a specific CBS news program. Every two weeks for the past two years Samuel E. Gill [6] has been measuring the audiences of

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[6] Samuel E. Gill, 52 Vanderbilt Ave., New York City.

Mr. Gill conducts an independent research service specializing in the measurement of media circulation, advertising effectiveness and public opinion.

Because the two standard program rating services do not make a practice of rating five-minute programs as a part of their regular services CBS commissioner Mr. Gill to set up a countrywide plan for checking the Elmer Davis news audience regularly.

[fol. 326] "Elmer Davis and The News", a five-minute, seven-times-a-week CBS program. On the basis of the Gill studies it is estimated that currently 15,000,000 people listen to Elmer Davis on the average night.

It is also estimated that a total of 30,000,000 *different* people hear the program during the average week. This accumulated audience is explained by the fact that whereas approximately the same number hear Elmer Davis each of the seven nights, the same people do not hear him every night. Some listeners drop out, others are added, so that during a week's broadcast the total number of different people who hear him at least once is far greater than the audience of a single broadcast.

Frank Stanton.

Subscribed and sworn to before me this 5th day of January, 1942. George A. Burwell, Notary Public. N. Y. Co. Clk's No. 527, Reg. No. 3B800. Kings Co. Clk's No. 119, Reg. No. 3459. Bronx Co. Clk's No. 62, Reg. No. 248B43. Queens Co. Clk's No. 2167, Reg. No. 8330. Certificates filed in Westchester and Richmond Counties. Commission Expires March 30, 1943. (Seal.)

The method adopted for surveying the Elmer Davis audiences is known as the "immediate recall" plan. Representative telephone families are contacted for 15 minutes immediately following the close of the Davis broadcast. Each person answering the telephone is asked questions which elicit information whether he or she listened to the Davis broadcast.

The Elmer Davis audience is checked by Gill in 20 representative cities the first and third weeks of each month. A minimum quota of 4,800 telephone interviews is made during each 7-day period.

These special bi-weekly measurements of the Elmer Davis audience were begun in the Spring of 1940 and have continued through to the present time.

(Here follow 2 photolithographs, side folios 327-328)

[fol. 327]

EXHIBIT "A" TO AFFIDAVIT OF FRANK STANTON

Outstanding CBS Special Events Programs Broadcast During 1941

Day and Date	Program	Time
Mon., Jan. 6	President Roosevelt's Message to Congress	2:00- 2:45 PM
Mon., Jan. 20	President Roosevelt's Third Inaugural Ceremonies: The Nation Prays With The President	10:30-10:37 AM
Mon., Jan. 20	President Roosevelt's Third Inaugural Ceremonies: Description of Inaugural Parade	2:30- 3:00 PM
Sun., Feb. 9	Prime Minister Churchill reporting from London on "The Progress of World War II"	3:00- 3:37 PM
Sat., Mar. 15	President Roosevelt speaking on "Aid to the Democracies" at the White House Correspondent's Dinner	9:30-10:08 PM
Tues., Mar. 25	Lord Halifax, British Ambassador to the United States, speaking on "British War Aims" at the Pilgrim Society Dinner	10:15-11:08 PM
Sun., Mar. 30	Variety Program, starring Marian Anderson, Ethel Waters, Joe Louis and Duke Ellington, in behalf of the National Urban League's campaign to aid the Negro unemployment problem	5:00- 6:00 PM
Sun., Apr. 13	Pope Pius XII giving his Easter Message from Vatican City	6:00- 6:48 AM
Sun., Apr. 27	Prime Minister Churchill reporting on "The Progress of World War II and American Aid to Britain" from London	4:00- 4:33 PM
Sat., May 10	Colonel Charles A. Lindbergh and others speaking at a rally of the America First Committee	10:15-11:00 PM
Tues., May 27	President Roosevelt clarifying the national policy in a "Fireside Chat" to the nation	10:30-11:15 PM
Sun., June 22	Prime Minister Churchill speaking from London on Hitler's invasion of Russia, followed by a two-way conversation between Elmer Davis in New York and Edward R. Murrow in London on British reaction to Mr. Churchill's speech and the war in general	3:00- 3:27 PM
Thur., June 26	Pope Pius XII addressing the Ninth National Eucharistic Congress in St. Paul, Minn., from Rome	2:00- 2:17 PM
Tues., July 8	Description of All Star Baseball Game from Detroit	2:15- 5:00 PM
Mon., July 21	President Roosevelt proclaiming to Congress that a state of national emergency existed in this country	3:30- 3:50 PM
Sun., Aug. 10	Queen Elizabeth, speaking from England, to thank the American relief organizations for their British Aid	4:00- 4:12 PM
Sun., Aug. 24	Prime Minister Churchill speaking from London on his meeting with President Roosevelt and the progress of the war	4:00- 4:30 PM
Mon., Sept. 1	President Roosevelt's Labor Day Address from Hyde Park	1:46- 2:00 PM
Mon., Sept. 1	Heads of governments in exile in London speaking from that city on the Second Anniversary of World War II	4:00- 4:45 PM
Thur., Sept. 11	President Roosevelt outlining our government's future foreign policy in a talk from the White House	10:00-10:30 PM

[fol. 328]

EXHIBIT "A" TO AFFIDAVIT OF FRANK STANTON—Continued

Day and Date	Program	Time
Thur., Sept. 25	One of the weekday series of descriptions of the "battle" between the Second and Third Armies in Louisiana	4:30- 4:45 PM
Wed., Oct. 15	Secretary of Agriculture Wickard outlining a 1942 farm defense program in his speech on "Food For Freedom"	10:15-10:30 PM
Mon., Oct. 27	President Roosevelt addressing the Navy League Dinner in Washington	10:00-10:30 PM
Tues., Nov. 11	Red Cross Roll Call broadcast: speeches by Vice President Wallace, Secretary of War Stimson, Secretary of Navy Knox; Associate O.P.M. Director General Hillman, and Red Cross President Davis	10:00-11:00 PM
Tues., Nov. 18	Wendell L. Willkie speaking on "A Better Understanding for Labor"	10:30-10:45 PM
Sat., Nov. 29	The Army and Navy annual football classic at Philadelphia	1:15- 4:00 PM
Mon., Dec. 8	President Roosevelt's war message to Congress and description of Congressional voting proceedings	12:15- 1:30 PM
Mon., Dec. 8	Prime Minister Churchill speaking to the United States re: Britain declaring war on Japan	3:00- 3:22 PM
Tues., Dec. 9	President Roosevelt's first wartime Fireside Chat	10:00-10:30 PM
Mon. Dec. 15	Bill of Rights Commemoration Program. Brief address by President Roosevelt and drama specially written by Norman Corwin	10:00-11:01 PM

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF EDWARD KLAUBER

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss.:

EDWARD KLAUBER, being duly sworn, deposes and says:

I am the Executive Vice-President of Columbia Broadcasting System, Inc. (hereinafter called Columbia or CBS), have been its Executive Vice-President since 1936 and have performed the same duties under various other titles since August, 1930. I was previously employed by the New York Times successively in reportorial and editorial capacities for 13 years and prior to that by the New York World for four years. I have been instrumental in the formulation of Columbia's program policies and have had direct supervision of the general execution of such policies.

[fol. 329] The program policies of Columbia, just as the editorial policies of any printed publication, determine its character and the public reputation which it enjoys. The reputation which a printed publication enjoys is reflected in terms of its circulation; the reputation of Columbia is reflected in terms of its listening audiences and the degree to which they trust and rely upon Columbia programs.

Accordingly, Columbia has always striven, in discharging its obligations in the public interest, which it is firmly convinced is also its own long-time interest as a publication, to establish a character and a reputation of the highest order. Its policies with respect to important types of programs have from time to time been incorporated in formal statements, some of which are set forth below.

General Policies Respecting Controversial Public Issues. In the President's annual report to CBS stockholders for the year 1935 appears the following which was a clarification and re-statement of principles which had governed its conduct to an increasing degree since the inception of its business:

"The Columbia Broadcasting System does not sell time to individuals or groups for the discussion of controversial public issues such as, for example, taxation, legislation or regulation. It supplies its time and its facilities as a public duty and refuses to accept pay for it. The sole exception to this principle is that after the candidates for the presidential election have been nominated, we cease giving time to the political parties and for the duration of the campaign, sell it, because during those few months the parties require, and should have, more time than we can afford to give away.

"The Columbia Broadcasting System is charged with editorial responsibility for what goes out over its network. It could not escape this responsibility if it would, and would not escape it if it could. In discharge of this responsibility; we will continue to allot available time for the discussion of public questions to spokesmen for opposing views. In allotting such time, we shall exercise our best and most informed judgment in maintaining program balance. By program balance we mean offering to the public all kinds of entertainment, instruction and information—the well-balanced radio fare which it wants and to

which it is entitled. We shall be further guided in such [fol. 330] allotments of time by day to day developments, by the shifting of public interest, and by the relative importance of topics available for discussion.

"At this point I wish to explain what we mean by editorial control and editorial judgment. We do not censor ideas. We do not ask that the views of any speaker agree with those of any member of our editorial staff nor has Columbia views of its own which must be maintained or protected. Our practice of having proposed addresses submitted to us in advance is based on our direct responsibility for what goes out over our stations. We examine proposed addresses first of all, to determine that they are interesting; second, that they are not libelous or slanderous; and third, that in questions of taste they are properly constructed to be heard in the living rooms of the nation by people gathered together in groups of every conceivable assortment.

"Our reasons for refusing to sell time for public discussion and for insisting upon giving it away instead, are three-fold. First, we believe that we have a public duty to bring such material to our audience regardless of the willingness of others to pay for it. Second, we believe that such discussion should be kept in balance by editorial judgment. If we sold time for the discussion of controversial issues, we would in fairness have to sell to all with the ability and the inclination to buy at a given moment. Thus we should surrender all possibility of regulating the amount of discussion on the air in proportion to other elements of well-balanced programming. Third, and by far the most important, we realize that if we sold time for the discussion of controversial public issues, for the propagation of the views of individuals or groups, we would necessarily allow a powerful public forum to gravitate almost wholly into the hands of those with the means to buy it.

"In conformance with our refusal to sell time for discussion of controversial public issues, we limit our advertisers in their message to the sale of their goods or services, or the promotion of public good will for their industry. As a simple example of what I mean, we would gladly sell time to a common carrier for the promotion of travel, but if we were asked to sell time to such a carrier which it

would use to agitate for new rates or different regulation, we would refuse."

[fol. 331] *Political Broadcasts.* In connection with the sale of time to political parties during campaign periods, noted above, the question of the dramatization of political issues first arose, also during 1935. After the most careful consideration Columbia concluded at that time that it would render only a public disservice if it accepted such dramatizations. I stated, in my letter of December 27, 1935 which was made public, Columbia's reasons for not accepting this form of political broadcast, as follows:

"Appeals to the electorate should be intellectual and not based on emotion, passion or prejudice. We recognize that even the oratorical discussion of campaign issues can be to a degree stamped with the aforementioned flaws, but we are convinced that dramatizations would throw the radio campaign almost wholly over to the emotional side. Then, too, we believe that the dramatic method by its very nature would tend to over-emphasize incidents of minor importance and significance, simply because of the dramatic value. While we realize that no approach to the electorate is absolutely ideal, we believe American voters have long been trained to discriminate among the assertions of orators, whereas we do not believe they could discriminate fairly among dramatizations, so that the turn of national issues might well depend on the skill of warring dramatists rather than on the merits of the issue debated."

News Broadcasts. In the early part of 1939 Columbia expressed its conception of its obligation with respect to dissemination of news, in a letter written by me to an executive of the National Association of Broadcasters, as follows:

"The underlying theory of a democracy is that, if you give people honest grist to grind on, they can reach the right decisions; in other words, the primary service which a broadcasting company can render in the news field is to inform the public as to what is happening and to make as clear as possible the significance of events, rather than to express either its own approval or disapproval or to devote its time to the editorial opinions of some particular commentator. This is especially true since the broadcaster,

if he is to maintain program balance, cannot devote so much time to news that the commentator becomes an incident in the presentation, as well may be the case with the [fol. 332] columnist in a newspaper. If a broadcaster devotes a reasonable amount of time to fair and two-sided discussion of controversial public issues, using representative speakers to give differing points of view, he is providing debate and the expression of opinion on controversial issues in a far more effective way than it can possibly be provided by one or even a handful of commentators, regularly expressing personal points of view on every conceivable subject.

"News periods, therefore, should be devoted to giving the facts emanating from an established news-gathering source, to giving all the color (in the proper sense of the word), and interest, and so on, without intruding the views of the commentator. It further can, and very often should, give as much light as possible on the meaning of events. In other words, the commentator should not say that they are good or bad, in his opinion, but should analyze their significance in the light of known facts, the results of similar occurences, and so on, and in this he of course should always be fair. He is fully entitled to give and should give the opinions of various persons, groups, political parties, and so so, when these are known, leaving the listener to draw his own conclusions after he has been, as well as possible, informed about the event, its meaning, the attitude of persons or groups toward it, the known results of similar things in the past and so on."

On October 17, 1939, shortly after the outbreak of war in Europe, in recognition of our responsibility in the handling of news, we issued a public bulletin to advertisers and others in which we stated:

"CBS is currently broadcasting a carefully planned and regularly spaced schedule of news programs covering the war, with due regard to audience interest and program balance. All news broadcasts, including news sources, news preparation, news announcers and their method of delivery, are subject to CBS supervision and are part of the network's public responsibility. Advertisers are requested to make no plans for new or additional news broadcasts without prior consultation with us."

Even prior to this public announcement, we issued on September 5, 1939, immediately after the outbreak of war in Europe, a general memorandum for the guidance of our own organization. A copy of this memorandum is annexed hereto as Exhibit "A". With the attack on Pearl Harbor [fol. 333] less than a month ago and our formal entry into the war, new problems have arisen. A copy of the current CBS memorandum of instructions to its news organizations is annexed hereto as Exhibit "B".

Religious Broadcasts. Since the early part of 1931 Columbia has not sold time for religious broadcasting. This decision was taken because it was found manifestly unfair to make our facilities available only to such ministers, religious organizations or parishes as happened to have the funds and the desire to buy time. During that year Columbia consulted with various religious leaders and as a result established a Religious Advisory Committee, representative of the outstanding faiths and denominations, which has continuously cooperated and advised with us in our Church of the Air programs to this day. Columbia's religious policy was announced at that time, and was succinctly restated in an office memorandum in 1933 as follows:

"We do not under any circumstances sell time for programs of a religious nature, or make any charge of any sort for the programs of this type which we present on the air, nor do we countenance any programs which are devoted wholly or in part to attacks on the religious faith and convictions of any group of American citizens. We believe it is not in conformity with public interest, convenience or necessity to permit on any pretext whatsoever the use of radio facilities for attacks on the clergy or lay members as representing any denomination.

"Inasmuch as it would be impossible for us to grant all requests received from individual churches and religious groups, for time on the air, we allot a half-hour period for religious broadcasting each Sunday morning and afternoon. These periods are assigned to the major established faiths, namely, Protestant, Jewish and Catholic, Christian Science, Mormon and Dutch Reform. The outstanding denominations of the Protestant Church are included in this group.

"The arrangements covering our religious services are made by us after careful consideration and consultation with representatives of the faiths and denominations presented on the air. It is our desire and policy to have these

[fol. 334] programs conform as nearly as possible to the regular morning and afternoon services held within churches. We do not schedule any one individual for a series of religious programs, believing we will render a more progressive and beneficial service by enabling the nation as a whole to hear the greatest number and largest variety of our distinguished religious leaders. We consider also that this practice encourages and helps to develop new leaders.

"It is our plan and desire to make the Church of the Air services representative of the outstanding religious thought in the country and representative, as well, of all the geographical sections of the country; to insure their being both nationwide and international in their scope. Programs are presented by some of the most outstanding religious leaders in Europe, in England, Ireland and Canada. During Lent and Holy Week special series of broadcasts are arranged from the great cathedrals and distinguished leaders speak from their pulpits or from our studios in commemoration of this religious period.

"It is recognized, of course, that there are numerous other groups of our citizenry who are followers of religious teachings or concepts which are not included in the faiths enumerated above. Our policy is not formulated upon a discrimination against any one or all of them; but is based primarily upon a consideration of the public interest and necessary limitation upon available time."

Columbia's basic policies with respect to the treatment of children's programs, length of advertising messages, advertising products in good taste, and other basic practices relating to commercial programs are set forth in Columbia's statement of May 15, 1935, a copy of which is annexed as Exhibit "B" to Mr. Paley's affidavit herein verified October 30, 1941.

Edward Klauber.

Subscribed and sworn to before me this 5th day of January, 1942. George A. Burwell, Notary Public. N. Y. Co. Clk's No. 527, Reg. No. 3B800; Kings Co. Clk's No. 119, Reg. No. 3459; Bronx Co. Clk's No. 62, Reg. No 248B43; Queens Co. Clk's No. 2167, Reg. No. 8330. Certificates filed in Westchester and Richmond Counties. Commission Expires March 30, 1943. (Seal.)

[fol. 335] EXHIBIT "A" TO AFFIDAVIT OF EDWARD KLAUBER

September 5, 1939.

CBS European War Coverage

A Memorandum Governing General Operations for the Information of the Organization

This memorandum is issued to formalize and amplify the instructions under which we have been operating ever since the crisis developed.

Our plan of operation represents no basic change in the policy which this company has maintained in the past. This policy has been to deal honestly, accurately and fairly with the news and with public discussion.

Columbia's announced policy of having no editorial views of its own and not seeking to maintain or advance the views of others will be rigidly continued.

President Roosevelt said in his address to the nation on Sunday night that America is the best informed nation in the world. This is because we have in America a free radio and a free press. We shall continue to keep America as well informed as possible on all phases of the war, including the propaganda of various nations, and the proposals and discussions which go on in this nation and other nations about war or any aspect of it. We are not responsible if the facts either help or hinder participants in the conflict or either please or displease advocates in America of any particular line of conduct here or elsewhere.

Columbia, as an organization, has no editorial opinions about the war. It has no editorial opinions about what this country or any other country should or should not do. Those, therefore, who are its voice in presenting or analyzing the news must not express their own feelings. This does not preclude informed appraisals of the meaning of facts. The opinion phase of the situation will be covered by speakers under our usual policy for the fair discussion of controversial public issues.

In being fair and factual, those who present the news for Columbia must not only refrain from personal opinion, but must refrain from microphone manner designed to cast doubt, suspicion, sarcasm, ridicule or anything of that sort on the matter they are presenting. This should be partic-

[fol. 336] ularly observed when it is necessary to interpolate comment because an address is being received in a foreign language or in running fragments necessitating the filling in of time between breaks. It should always be remembered that the speaker is entitled to get his own point of view over as effectively as he can.

What news analysts are entitled to do and should do is to elucidate and illuminate the news out of common knowledge or special knowledge possessed by them or made available to them by this organization thru its news sources. They should point out the facts on both sides, show contradictions with the known record, and so on. They should bear in mind that in a democracy it is important that people not only should know but should understand, and their function is to help the listener to understand, to weigh, and to judge, but not to do the judging for him.

It is impossible, within any reasonable limits, to define completely this last-mentioned aspect of news analysis. Fairness and temperateness are of its essence.

In this connection, prophecy, so far as possible, should be avoided. It is foolish to say "Germany will be licked in six months." It is perfectly proper to say that certain military experts (or the speaker himself, if he be such an expert) believe, in the light of the following known military facts that the defeat of Germany in six months might be possible. An unexcited demeanor at the microphone should be maintained at all times, though the tempo can of course be varied with the nature of the news. Dire forebodings, leaving the radio audience hanging up in the air and filled with suspense and terror, of our own creation, are not good broadcasting. We should not tell the listener that, at this very moment, innocent women and children may be drowning somewhere in the Atlantic because another ship may have been torpedoed by a German submarine, or anything of that nature.

The basis of our operations is a staff of trained Americans, both in this country and in Europe, most of whom have had news training with newspapers or press associations, and all of whom have had training in broadcasting in general and in our own operations in particular. We are to continue to use Americans as far as possible and all our correspondents abroad have been instructed and will be reinstructed not to make use of foreigners (except on those

[fol. 337] occasions where they are making speeches frankly presenting their own points of view). Foreigners will be used in our regular news coverage only in emergencies when a satisfactory American cannot be immediately obtained. In these cases his nationality is to be stated.

We have three main sources of news: 1) the three press associations—the Associated Press, the United Press, and the International News Service; 2) information possessed or obtained by our own staff of editors in the News Department and our news analysts here and our news staff in Washington, London, Paris, Berlin, Warsaw, Rome and Tokyo, and such other points as we cover from time to time; 3) shortwave broadcasts by government-owned European stations and miscellaneous sources of information of various sorts.

In making use of all of these sources, we must at all times be careful to label information for what it is, using the same kind of care that is habitually used by press associations and good newspapers. We must try to distinguish fact from rumor, official information from semi-official 'high sources' and so on, and from mere gossip. Of course the greatest weight should be given to those things known to be factual. We should make known at frequent intervals that the news received from many sources is censored and that, therefore, it may be incomplete and at times even inaccurate.

If all our own people presenting news will present it in this way and analyze it with due weight given to these factors, we can keep the American public very well informed on every phase of things as they develop, help them continually to appraise and weigh the news, and make them well aware of current opinion throughout the world. It must be recalled that this opinion is, in itself, a fact. For instance, if the British people believe that the Germans are committing atrocities, the fact of their belief is important. That these atrocities are real, false, or unproven is another fact. Broadcasting of properly identified fact, allegation, opinion, rumor and all the other attendant circumstances in which the conflict progresses will continue to keep the American listener the best informed in the world. In no other way can he know all that he should know.

In presenting the addresses of foreign statesmen and other speakers, we will be guided solely by news judgment

[fol. 338] (in the light of program balance). If we present them when the given situation indicates that they should be heard over here, we shall do a fair and honest news job. We will have to use our best efforts to overcome the handicap of one side not talking our language. We also will have to be guided by the breaks of the news. For example, if Hitler speaks one day and no one else does, or if Chamberlain speaks and no one else does, it would of course be silly to leave off the speech of one side because we had none from the other. An excellent example of how fair and comprehensive broadcasting can be was furnished on Sunday, when there were speeches from London, from Paris, and from Canada, but none in Germany which were made available for broadcasting. We succeeded in obtaining the text of various Hitler proclamations and statements and presented his side perhaps just as well as if he had spoken.

The point in the foregoing and in guiding much of our operation is that, if we will honestly and sincerely try to present the news, regardless of which way it points, we shall do a much better job than if we merely strive for a sort of mathematical fairness. Let us take for example the round-ups of editorial opinion which we occasionally present. Decision to present one of these should be based solely on a belief that newspaper reaction to a given thing (the British-French declaration of war, or the President's speech at the outbreak of the war) is of great interest to the general public. As long as we present them on this basis, we are being honest and fair. The minute we presented one because somebody here had some personal desire to influence public opinion on some given question, we should be operating badly. By the same token, if we refrained from presenting one because it did not reflect the point of view we had hoped for, or if we selected editorials to make a particular point of view emphatic, we would be doing an intolerable kind of job. I know this would never happen here; I mention it merely by way of illustration.

The same thing applies to presenting either individual broadcasts of European government stations or a summary of such operations for a given day. If we were merely on a mathematical basis to present so many minutes of each, it might very often be dull and tedious. If, with honest news judgment, we pick out what is salient, we will do a good job even though on one occasion we might present

[fol. 339] nothing except that which had been said over a German station or some station presenting the point of view of the other side. Here, too, we must be guided by honest, sincere news judgment and our fundamental purpose of presenting all points of view as the breaks of the news require.

We come now to the question of speeches over here on public questions related to the war. Here we shall follow our traditional policy. If there are persons in America who think we should enter the war and others who think we should keep out, we shall permit the public debate of this question, selecting as far as possible, speakers with varying points of view. We cannot do an honest job for the American public without letting them know that there are varying opinions and that these opinions are being agitated. In the same way, if, for example, the President, proposes repeal of the present Neutrality Act, we shall carry as fully as possible the outstanding debate on this issue. The amount of debate naturally will be gauged by the public interest in the current question, its importance and the imminence of action.

Our own purveyors of news over the air, both here and abroad, will be free to deal with controversial issues discussed in speeches, the same as they deal with any other phase of the general situation. For instance, they may give factual information about the progress of the argument, and our broadcasters from abroad may tell how those countries feel, what their officials are doing, if anything, towards trying to influence a given issue over here, and so on, as long as the broadcaster himself refrains from doing anything that comes out of himself which is designed to influence action one way or the other.

This memorandum has purposely been made lengthy in the hope of clarifying the thinking of all concerned about the general principles which will guide us in broadcasting the war. As a final word, it should be remembered that Americans should know everything we can possibly tell them about every phase of the situation, provided only that it is important that we put it out for exactly what it is, that we do our best to inform and explain with honesty and sincerity, and thus demonstrate once more that radio plays a tremendous part in the maintenance of all that is best in a democracy.

Edward Klauber, Executive Vice-President.

[fol. 340] EXHIBIT "B" TO AFFIDAVIT OF EDWARD KLAUBER

Columbia's War Coverage

A Memorandum to the CBS News Organization

President Roosevelt has said that America is the best informed nation in the world. This is because we have a free radio and a free press. In war time it becomes more important than ever that we should continue to be the best informed people in the world. This is essential for two reasons; first, in order that military and civilian morale be kept at the highest possible level so that we may win the war and win it as quickly as possible. Second, in order that the nation may be kept keenly conscious of why we are fighting this war, to the end that we may also win the peace.

This is a war for the preservation of democracy. The American people must not only always be kept vividly aware of this objective but of the value to every man, woman and child in the nation of preserving democracy. Thus we shall become capable of the utmost nation-wide effort and endurance because we shall all share a common knowledge of the nation's purpose in war.

And that same common knowledge and common valuation of our national heritage will do more than any one thing to insure that we win the peace. The peace will be won if, after victory in the war, and regardless of what we may have to endure in the immediate post-war years, we shall hold fast to democracy and the essential freedoms.

In keeping America the best informed nation in the world in war time we obviously face new difficulties and certain limitations. We should do our utmost to surmount the difficulties and to circumscribe the limitations to absolutely essential areas and to apply them, even within those areas, with common sense and judgment. In other words let us never adopt a negative attitude of fear and retreat, so that we search out for ourselves self-imposed areas of intellectual black-out. Rather let us try to keep on illuminating every area of the national life, our own military effort and the manifold phases of the world struggle, as far as we can possibly do so with assurance that we are doing good and not harm. Thus, we will be using all our skill and judgment in adopting our trained resources of man-power and [fol. 341] our technical facilities to shedding light and not

darkness. This of course we must do without running counter to the national objectives.

There is not room within the scope of this memorandum to do more than hint at the reasons why it is more important than ever to keep the American people the best informed in the world. Certainly, their habit and their expectation is to know; they are not a regimented or blindly obedient people and their support for what they understand will be incalculably greater than their obedience to blind command. They will surrender anything, including many of their present liberties, if they surrender them consciously and after they are made to understand why they must be given up and if the atmosphere is one of temporary and willing surrender for a common purpose.

Moreover, the American people will trust the civil and military authorities only if they believe and know that as far as is possible and consistent with the military effort the truth is being told to them and they are not being deceived. Besides all this, they will be far less a prey to enemy propaganda than if they are so ill-informed that they may easily fall victims to the destructive effect of every rumor set afloat for the purpose of dismaying and confusing them.

American democracy has functioned always in a spirit of free speech which has involved free and open criticism. This function must be preserved lest any serious mistakes go undetected and uncorrected and lest the people lose confidence in their leaders because they feel that they are being told too little. Any mechanism of suppression for other than immediate military motives almost certainly will eventually fail and then great damage will have been done and ground lost which it will be slow and difficult to regain.

Our news operation in war time, therefore, is not essentially different from what it is in peace time. We simply have to apply the same judgments and the same skills to new problems. We have to be as energetic and resourceful as possible in keeping the radio audience informed; at the same time we have to see to it that we do not broadcast information of military value to the enemy and that we do not cause unnecessary and useless anguish, suspense, or confusion among our own people or any part of them.

Informing the radio audience means, without hysteria and with all due and proper restraint, keeping vividly, color-
[fol. 342] fully, and honestly before our people all that is

going on in the world, including both the things that touch the minds and the things that touch the hearts of men. Of course, we must limit ourselves to what can properly be told, and make certain that as far as possible the proper evaluation is placed upon the material and that to the best of our ability we explain and illuminate its meaning.

The restraints we must exercise fall into two categories; (a) self-restraint dictated by common sense, news judgment and our growing experience with changing conditions, (b) full and prompt obedience to any lawful directions given to us by constituted authorities, reserving to ourselves only the right afterwards to discuss with such authorities the wisdom of any directive which we may believe should be rescinded or altered.

In all that we do we must bear in mind that we must never allow competition among broadcasters or between a broadcaster and other media of public information to betray us into recklessness or irresponsibility. Columbia wants to be first with the news whenever it can and as often as it can, but Columbia would rather be last, or never broadcast certain material at all, than to rush on the air with news that should not have been put out. In this connection, it should be remembered that we have in our medium the power of virtually instant correction and we must never hesitate to correct as rapidly as possible any erroneous fact or wrong impression that we may at any time broadcast.

In evaluating news we should, of course, look first of all to official and qualified sources, second to the press associations and our own world-wide news-gathering facilities, and third to rumor, voluntary informants, broadcasts by enemy nations, and so on. Extreme care and vigilance must be used in accepting material from any of the last-mentioned sources. Every possible effort should be made to verify it before its use. If judgment dictates that some of it should be broadcast as unverified rumor or as emanating from enemy sources, it not only should be used with care and reserve, but its precise nature and origin should be carefully pointed out and its probable purpose and meaning should be indicated.

In regard to what constitutes military information that might be of value to the enemy, various government depart- [fol. 343] ments have already indicated definitions. The following subject matter is to be avoided, *unless officially disclosed:*

1. Movements or location of any war or naval vessels or planes, as well as the identity of personnel on such vessels or planes. This, of course, applies to aircraft and seacraft belonging to our Allies as much as to those belonging to the United States.

2. Movements of merchant vessels flying the flag of the United States or of any Ally.

3. Troop movements.

4. Assembly, movement or embarkation of war material.

5. The identity of any American or Allied merchant vessels attacked by the enemy, as well as the identity of any of its officers or crew.

6. Details regarding the strength or activity of any navy or military shore establishment.

7. Any experiments with war material, particularly relating to new inventions.

8. The laying of mines or mine fields.

9. Secret notices or instructions relating to aids to navigation.

10. Weather information. This, at present, is to be treated as a local problem by each station and authorities in each area will determine whether weather reports are to be broadcast.

11. Selective service quotas—area, state or local.

12. Casualty lists.

It should be stressed again that there is no proscription on any of these topics *if they are officially released.* However, CBS news editors should reserve the right of decision as to whether they wish to broadcast certain information even when approval has been granted.

From time to time each CBS news man will receive certain unofficial information within the categories described [fol. 344] above and naturally will wish to broadcast such information if it is releasable. To that end, both the New York and Washington news rooms are now staffed 24 hours a day, seven days a week, and arrangements have been made to check these reports with responsible governmental

bureaus. This service is available not only to the news staffs of CBS owned and operated stations, but also to all affiliated stations.

A most important part of our information continues to come from press associations. However, the very fact that any given piece of news is carried by a press association whose editors also have exercised their judgment before releasing it; does not necessarily mean that Columbia considers the item broadcastable. In other words, all news dispatches should be assayed by Columbia's news editors despite the fact that they already have survived previous judgments.

Now to examine the subject of eyewitness descriptions of air raids when and as they may occur. It is conceivable that an invading plane might carry a receiver purely in the hope that some station would be broadcasting eyewitness reports of the damage inflicted. In that event, any announcer who gave overly specific information regarding damage would be giving information of great value to the enemy. Thus, all announcers and reporters are instructed to bear constantly in mind the dangers of precise descriptive material. It would be far better to withhold one's exact location and say, for instance, "over to my left a big business building appears to have been hit by a bomb," rather than "the First National Bank Building next door to the roof on which I am standing has just been hit".

All air alarms should be handled with considerable care. On the whole, it is advisable not to put out any information regarding alarms until after the all-clear has been sounded or it develops that an actual raid is in progress. To tell in a news period that a certain city is having an air raid alarm will merely succeed in creating fear and panic and will doubtless lead to a complete swamping of long distance telephone facilities by listeners anxious to reassure themselves regarding the safety of friends and relatives in that city. It would be far better to wait and see if the alarm preceded an actual raid or if the all-quiet signal is given before any reference is made to the alarm.

[fol. 345] More than ever before, a calm and unexcited demeanor at the microphone is essential. Naturally, there should be variations in tempo according to the nature of the news. However, all announcers should try to keep a

sense either of foreboding or exultation out of their voices and should keep to as factual a tone as possible no matter what the news. It should be remembered at all times that in warfare it is rare that a single reverse or triumph is decisive. Accordingly, no item should be broadcast so as to cause either exaggerated optimism or create defeatism and despair.

Commercial news broadcast must be watched particularly to prevent news phrases such as "bulletin" and "flash" to be used for purposes of advertising.

It is now, of course, much more important than ever not to permit distortion or over-emphasis of the news through improper dramatization of improper sound effects in connection with news broadcasts. Particularly, of course, there should be no use of sirens or other sound effects which might be construed as air raid alarms or alert signals.

It is necessary to maintain a constant vigil over your news machines and studios during all hours of operation. It is of prime importance not to permit any stranger to enter the news room or studio at or near the time of broadcast. Run the risk of being thought rude because you question visitors unknown to you rather than permit any possibility of an unauthorized broadcast.

Similarly, you should not accept any telephone requests for announcements without being certain of your informant. If there is any doubt in your mind take his telephone number, verify it and call him back.

From time to time as different conditions develop that can not now be foreseen, we intend to issue supplements to this memorandum. They will be sent to every CBS news editor, writer, reporter, announcer and analyst, all of whom are now war correspondents just as much as if they actually were at headquarters near the front lines. The important thing to all of us is that we build—and keep on building—public confidence in our news. That confidence should prove a valuable machine tool in the production of victory.

Paul W. White, Director of News Broadcasts.

[fol. 345a] In United States District Court for the Southern District of New York

[Title omitted]

Affidavit of Harold C. Read, Program Service Manager of the Long Lines Department of the American Telephone and Telegraph Company.

United States of America
Southern District of New York
City, County and State of New York ss:

Harold C. Read, being duly sworn, deposes and says:

I am Program Service Manager of the Long Lines Department of the American Telephone and Telegraph Company. On the 25th day of November, 1941, I made an affidavit in the above entitled matter at the request of the Federal Communications Commission relative to the establishment of a network of 64 stations for a one-half hour program once a week giving the charges therefor and information as to the availability of the necessary facilities.

Columbia Broadcasting System, Inc., has requested me to answer the questions enumerated below, which refer to the information contained in my said affidavit.

[fol. 345b] Question #1: With the 52-week charge for the 64 station lineup of $141,504.80, what is the average charge per program, and what is the average charge per station per program?

Answer: The total cost for program transmission service to the 64-station network referred to in my said affidavit is $141,504.80 for one half-hour program per week for 52 consecutive weeks. From mathematical computations this equates to $2,721.25 per program and $42.52 per station per program. The Telephone Company does not quote its charges for a program network service on a per program or per station basis.

Question #2: Does the phrase "per hour or fraction thereof" relating to Schedule "B" mileage rate mean that two consecutive half-hour programs from the same point of origin to the same network of stations would cost no more than for a single half-hour program?

Answer: Under Tariff F. C. C. No. 198, the interexchange channel charge for Schedule "B" service is $.20

per airline mile "per hour or fraction thereof". For the same customer, and the same network and the same stations, the interexchange channel would cost no more for one program of one hour's duration or two consecutive half-hour programs from the same point of origin than it would cost for a single half-hour program or a single program of any lesser duration.

Question #3: If the answer to Question #2 is "yes", what would be the average charge for the service for each program of two consecutive half hours and what would be the charge per station per program on this basis?

Answer: Based on a total cost of $141,504.80 for a half-hour program per week for 52 weeks to the 64-station network referred to above, which is the minimum charge for [fol. 345c] said network for one hour or fraction thereof, the mathematically equated average for each of two consecutive half-hour programs per week (104 half-hour programs during 52 weeks) furnished to the same customer, on the same network and the same stations, and from the same point of origin would be $1,360.62 and the average per station per half-hour program would be $21.26. The Telephone Company does not quote its charges for a program network service on a per program or per station basis.

Question #4: How does the mileage rate for Schedule "B" service compare with the mileage rate for Schedule "A" service, and what is the user entitled to when he purchases Schedule "A" line service?

Answer: Under Tariff F. C. C. No. 198, the interexchange channel rate for Schedule "B" service is $.20 per airline mile per hour or fraction thereof and the interexchange channel rate for Schedule "A" service is $8 for 16 consecutive hours daily per airline mile per month. The $8 per mile per month Schedule "A" interexchange channel rate entitles the user to the use of the interexchange channel for 16 consecutive hours of program service per day or a total of 480 hours in a 30-day month.

Question #5: Approximately at what point in terms of hours of use does the charge for Schedule "B" line service equal the charge for Schedule "A" line service?

Answer: The Schedule "B" interexchange channel charge equals the Schedule "A" interexchange channel charge when a total of 40 hours of Schedule "B" interexchange channel has been furnished within a period of one month. This assumes that the same customer, the same

network and stations, and the same point of origin would be involved.

[fol. 345d] Question #6: When the point is reached can the customer change his basis from Schedule "B" service to Schedule "A" service or is the application of Schedule "A" service rates made automatically by the Telephone Company retroactive to the prior use of Schedule "B" service during the month?

Answer: When within a period of one month the charges to the same customer for any section of a network, at Schedule "B" rates, equal or exceed those that would be obtained by applying to such section the rates for Schedule "A" facilities and services, such section is charged for in accordance with the rates applicable to Schedule "A", except that the interexchange mileage used in the Schedule "B" pricing is used.

Question #7: Would three consecutive half-hour's use of transmission service on the assumed 64-station hookup on each day of the month involve the application of the Schedule "A" rate?

Answer: The furnishing of service to the same customer on the 64-station network referred to above for three consecutive half-hour programs per day would involve the application of Schedule "A" rates as the maximum for the Schedule "B" families and services provided the point of program origin were the same.

Question #8: What is the connection charge per month for Schedule "A" service on the assumed 64-station hookup?

Answer: The station connection charge for Schedule "A" service of $125 per station per month for 16 consecutive hours service daily would amount to $8,000 per month if the assumed 64-station network were priced at Schedule "A" rates.

[fol. 345e] Question #9: What is the total monthly charge, mileage and connections, for the 64-station hookup for Schedule "A" service assuming, as was done in the prior affidavit, loops to be existing? Converted to a daily basis what is the charge? If three half-hour programs were broadcast each day what would be the charge per station per program? If six programs per day were broadcast what is the charge per station per program? If twelve

programs per day were broadcast what is the charge per station per program?

Answer: The monthly charge for Schedule "A" service for the assumed 64-station network (local channels considered existing) would amount to $90,216 made up as follows:

Interexchange Channel 10,277 airline miles x $8	$82,216
Station Connections 64 stations x $125	8,000
Totaf	$90,216

Based on a 30-day month the computed average per day would be $3,007.20.

Based on a total monthly charge of $90,216 or a computed average per day of $3,007.20 and assuming that the computed daily average of $3,007.20 were equally apportioned to each of the three half-hour programs, the equated portion for each half-hour program would be $1,002.40 and equally apportioned to each of the 64 stations would be $15.66 per station per half-hour program.

Using this same method of computation, six programs per day would equate to $501.20 per program or $7.83 per station per program.

Likewise, twelve programs per day would equate to $250.60 per program or $3.92 per station per program.

[fol. 345f] The above computations assume that the same customer and the same point of program origin were involved. The Telephone Company does not quote its charges for a program network service on a per program or per station basis.

This affidavit is made at the request of Columbia Broadcasting System, Inc.

Harold C. Read, Program Service Manager.

Subscribed and sworn to before me this 9th day of January, 1942. William John Keener, Notary Public, Nassau County No. 833. Cert. filed in N. Y. County. N. Y. Co. Clk's No. 130, Reg. No. 2K-112. Commission expires March 30, 1942. (Notarial seal.)

[fol. 345g] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted.]

AFFIDAVIT OF HAROLD C. READ, PROGRAM SERVICE MANAGER OF THE LONG LINES DEPARTMENT OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY

UNITED STATES OF AMERICA,
Southern District of New York
City, County and State of New York, ss.:

HAROLD C. READ, being duly sworn, deposes and says:

I am Program Service Manager of the Long Lines Department of the American Telephone and Telegraph Company. I am in charge of the division of the Long Lines Commercial Department of the American Telephone and Telegraph Company which furnishes to radio-broadcast stations and networks facilities for the transmission of programs between various cities in the United States. My functions relative to the furnishing of program transmission facilities are concerned with the commercial aspects of the service and are as follows: to develop and maintain customer contacts, including negotiations with networks [fol. 345h] and radio stations for program transmission service; to cooperate with other Long Lines departments in determining the availability of facilities suitable for the furnishing of program service of the schedule classification desired; to prepare and furnish to customers quotations as to the charges to be applied for the service desired; to furnish the necessary information to other departments for computing service charges for preparing contracts, contract modifications and billing statements for service furnished; to sign contracts and contract modifications and obtain customers' signatures on contracts. I personally participate in negotiations with networks and radio stations relative to program transmission service.

I am generally familiar with the various aspects of the Telephone Company's business relating to the furnishing to networks and radio stations of circuits for the transmission of radio programs to practically every important city in the United States. The circuits required for program transmission service are of various grades, generally of a

higher quality than those required for ordinary speech transmission. Specifically, those required for Schedule "B" (the schedule under consideration in this affidavit) are of high quality and require special equipment of many kinds in addition to special operation and supervision in order to insure the transmission with high fidelity of programs between cities. I am familiar with the terms on which the Telephone Company furnishes to the National Broadcasting Company, the Columbia Broadcasting System, and the Mutual Broadcasting System, the circuits by which they distribute their network programs to their various affiliated stations located throughout the country. I have had experience with technical matters in connection with the furnishing of this service to the three nationwide network organizations.

In connection with the furnishing of program transmission facilities to customers of the Telephone Company, I am required to obtain from other departments of the Long Lines Department information with respect to the availability of facilities, including those furnished by Associate Companies, for the transmission of programs between various cities of the United States. For the purpose of this affidavit, I have obtained from such other departments of the Long Lines Department the information contained herein with respect to the availability of facilities, including [fol. 345i] those furnished by Associate Companies, for the program service in question.

I have studied the information contained on the map entitled, "The No. 1 Advertiser Network Possible after August 1—64 Stations." Representatives of the Federal Communications Commission have requested me to state whether or not the Telephone Company has available sufficient program transmission circuits to connect the 64 stations shown on that map, and also to state what the charge for the furnishing of such circuits would be. I have been asked to assume that a prospective customer of the Telephone Company desires to broadcast a network program on a nationwide basis. He does not wish to utilize any of the established networks, but he has determined to use the facillities of the 64 stations shown on the map, and he wishes to obtain from the Telephone Company the wireline facilities necessary for the transmission of his program to those 64 stations. The program the customer has in mind is for one-half hour each Monday evening beginning at 9:00

P. M. Eastern Standard Time, the program to originate in New York City. The customer intends that the program series is to last for one year, but he desires to have an option to cancel the program series at the termination of any 13-week period. Such an arrangement would be satisfactory to the Telephone Company. The customer does not desire permanent lines between the stations but requests program transmission circuits between the 64 stations on a temporary basis for one-half hour per week, the circuits to have a frequency range from approximately 100 to approximately 5,000 cycles per second. Such temporary high quality service is known as Schedule "B" service.

Radio Station WFAA Dallas, Texas and Station WBAP in Fort Worth, Texas are shown on the map in the alternative. I have been informed that these two stations share time and operate on the same frequency. I have been informed further that, pursuant to a time-sharing agreement dated July 29, 1940, Station WFAA is authorized to operate Monday evenings from 6:30 to 9:30 P. M., Central Standard Time, which is from 7:30 to 10:00 P. M. Eastern Standard Time. Since the one-half hour from 9:00 to 9:30 P. M., Eastern Standard Time, is the period during which the pro- [Tol. 345j] gram is to be broadcast, the facts which I shall furnish will relate to Station WFAA.

At the present time the Telephone Company has available for the service desired the facilities for connecting only 54 stations out of the 64 stations requested. These 54 stations are shown in the list below. Of these 54 stations, 40 would be reached over regularly established program facilities which have been provided for program service, and 14 over facilities normally in the telephone layout for toll service, but which may be made suitable and available for the desired program transmission service.

Service to the 10 remaining stations cannot be provided until the completion of new construction without impairment of message toll telephone service because all existing program transmission circuits over these routes are in use and because message toll telephone traffic is now at an unusually high level. All of these stations are on main toll routes on which construction now under way or definitely planned will make the necessary facilities available. Such construction is planned for completion on the various dates indicated below. It should be pointed out, however, that

these dates are subject to variation, dependent upon traffic and construction conditions encountered in the future, and there is no assurance that those facilities will be definitely available on the dates indicated.

A. Stations which would be reached over facilities which have been provided for program service:

Portland, Me.	WCSH	Detroit	WJR
Boston	WBZ	Chicago	WMAQ
Providence	WJAR	St. Louis	KMQX
Springfield, Mass.	WBZA	Dallas	WFAA
Hartford	WTIC	Oklahoma City	WKY
Albany (Schenectady)	WGY	Tulsa	KVOO
New York	WJZ	Wichita	KFH
Philadelphia	WFIL	Kansas City	WDAF
Baltimore	WBAL	Omaha	WOW
Washington	WRC	Albuquerque	KOB
Richmond	WRVA	Portland, Ore.	KQW
Charlotte	WBT	Seattle	KOMO
Atlanta	WSB	Spokane	KHQ
Louisville	WAVE	Des Moines	WHO
Cincinnati	WLW	Minneapolis	WCCO
Cleveland	WTAM	Milwaukee	WTMJ
Pittsburgh	KDKA	Denver	KOA
Buffalo	WBEN	Salt Lake City	KSL
Rochester	WHAM	Los Angeles	KFI
Syracuse	WSYR	San Francisco	KPO

Total—40 Stations

[fol. 345k] B. Stations which would be reached over circuits normally in the regular telephone message layout but which can be made suitable and available for program service.

Bangor	WLBZ	Birmingham	WBRC
Roanoke	WDBJ	Columbia	WIS
Orlando	WDBO	Charleston	WCSC
Tampa	WFLA	Jacksonville	WJAX
Miami	WQAH	Houston	KPRC
Chattanooga	WDOD	San Antonio	WOAI
Knoxville	WROL	Duluth	WZBC

Total—14 Stations

C. Stations which could be connected to the proposed program network upon completion of construction now under way or definitely planned:

		Date Facilities are Expected to be Available
Raleigh	WPTF	4-1-42
Nashville	WSM	7-1-42
Memphis	WMC	5-1-42
Little Rock	KARK	5-1-42
Jackson, Miss.	WJDX	5-1-42
New Orleans	WWL	3-1-42
Shreveport	KWKH	4-1-42
Fargo	WDAY	7-1-42
Bismarck	KFYR	7-1-42
Phoenix	KTAR	5-1-42

Total—10 Stations

Charges for Program Transmission Service

Exhibit No. 1 and Exhibit No. 2 attached hereto have been prepared in order to illustrate the method utilized by the Telephone Company in accordance with its Tariff F.C.C. No. 198 in determining the pricing mileage on which the interexchange channel charges for the proposed service are based. The exhibits show the shortest airline mileages between the various stations on the advertiser network. The exhibits represent simply pricing layouts and the lines do not represent the routes of the actual program transmission circuits. The charges for these circuits are computed not on the basis of the actual length of the circuits but on the basis of the shortest airline mileage connecting the service and junction points. The cities on Exhibit 1, which are not connected to the network by lines are those which could be connected to the program network only upon the completion of additional construction.

It is assumed that existing local loops already furnished each station connecting each station with the telephone exchange in its city will be utilized and that, therefore, the [fol. 345] charges for local loops will be paid by each station and will not be billed to the customer who is requesting the program transmission service.

The total charges applicable at present rates, as filed in Tariff F.C.C. No. 198 of the American Telephone and Telegraph Company, Long Lines Department, for the network comprising the 54 stations to which the Telephone Company could supply program transmission circuits at the present time, are as follows:

a. *Mileage Charges*

Total pricing mileage (layout shown on Exhibit 1) 8,783 airline miles.

Schedule "B" rate per mile per hour or fraction thereof, $ .20.

Total mileage charges, 8,783 x $ .20 or $1,756.60 for one-half hour.

This mileage charge would be the same for each weekly half-hour of use.

b. *Switching Charges*

Associated with the first program there would be a switching charge of $.50 per station for disconnecting the local loop at each station at the conclusion of the program.

54 stations x $.50 = $27 switching charge for first program.

Associated with each succeeding program (except the last one) there would be a switching charge of $1 per station—$.50 for connecting the local loop at the start of the program and $.50 for disconnecting the local loop at the conclusion of the program.

54 stations x $1 = $54 switching charge for each intermediate program.

Associated with the last program there would be a switching charge of $.50 per station for connecting the local loop at the start of the program. No switching charge would apply for the final disconnection.

54 stations x $.50 = $27 switching charge for last program.

In addition to the above switching charges there will be other charges if rearrangements of existing services are necessary to make the assumed existing local loops available for this service.

[fol. 345m] *c. Other Charges*

For each station connected, station connection charges would apply as follows:

(1) A charge of $30 per month for each station, applied on a monthly basis only.

54 stations x $30 = $1,620 per month.

(2) A charge of $2.50 per station for each hour or fraction thereof of use.

54 stations x $2.50 = $135 per one-half hour program.

On the above basis the total charges applicable would be as follows:

A. *One program (one-half hour duration)*

Loops (assumed to be existing)	No charge
Mileage (8,783 x $.20)	$1,756.60
Switching (54 x $.50)	27.00
Station connection—Monthly basis (54 x $30)	1,620.00
Hourly basis (54 x $2.50)	135.00
Total	$3,538.60

B. *One Year (52 Programs, one-half hour duration)*

Loops (assumed to be existing)		No charge
Mileage (8,783 x $.20 x 52)		$91,343.20
Switching		
1st Program (84 x $.50)	$ 27.00	
Intermediate Program (54 x $1.50)	2,700.00	
Last Program (54 x $.50)	27.00	
		2,754.00
Station connection—		
Monthly basis (54 x $.30 x 12)		19,440.00
Hourly basis (54 x $2.50 x 52)		7,020.00
Total charge for one year		$120,557.20

One year to have 52 weekly programs would consist of twelve months—four months containing five programs each and eight months containing four programs each. Charges for the circuits for a 54-station network for a month contain-

ing five programs and for a month containing the four programs would be as follows:

[fol. 345n]

	Five Program Month	Four Program Month
Loops (assumed to be existing)	No charge	No charge
Mileage (8.783 x $.20 x 5)	$ 8,783.00	
(8.783 x $.20 x 4)		$7,026.40
*Switching (54 x $1 x 5)	270.00	
(54 x $1 x 4)		216.00
Connection (54 x $30)	1,620.00	1,620.00
Operation (54 x $2.50 x 5)	675.00	
(54 x $2.50 x 4)		540.00
	$11,348.00	$9,402.40

Charges for Circuits for 64-Station Network

After the circuits for a complete 64-station network could be provided by the Telephone Company, the total charges applicable at present rates as filed in Tariff F.C.C. No. 198 of the American Telephone and Telegraph Company, Long Lines Department, would be as follows:

a. *Mileage Charges*

Total pricing mileage (layout shown on exhibit 2), 10,277 airline miles.

Schedule "B" rate per mile per hour, $.20.

Total mileage charges, 10,277 x $.20 or $2,055.40 for ½ hour.

This mileage charge would be the same for each weekly half hour of use.

b. *Switching Charges*

Associated with the first program there would be a switching charge of $.50 per station for disconnecting the local loop at each station at the conclusion of the program.

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*Switching charge will be reduced by $27 for first month and $27 for last month since no charge is applied for connecting the local loop to the connection for the first program and no charge is applied for disconnecting the local loop from the connection on the last program.

64 stations x $.50 = $32 switching charge for first program.

[fol. 345o] Associated with each succeeding program (except the last one) there would be a switching charge of $1 per station—$.50 for connecting the local loop at the start of the program, and $.50 for disconnecting the local loop at the conclusion of the program.

64 stations x $1 = $64 switching charge for each intermediate program.

Associated with the last program there would be a switching charge of $.50 per station for connecting the local loop at the start of the program. No switching charge would apply for the final disconnection.

64 stations x $.50 = $32 switching charge for last program.

In addition to the above switching charges there will be other charges if rearrangements of existing services are necessary to make the assumed existing local loops available for this service.

c. *Other Charges*

For each station connected, station connection charges would apply as follows:

(1) A charge of $30 per month for each station, applied on a monthly basis only,

64 stations x $30 = $1,920 per month.

(2) A charge of $2.50 per station for each hour or fraction thereof of use.

64 stations x $2.50 = $160 per program.

On the above basis the total charges applicable would be as follows:

A. *One Program (one-half hour duration)*

Loops (assumed to be existing)	No charge
Mileage (10,277 x $.20)	$2,055.40
Switching (64 x $.50)	32.00
Station connection—Monthly basis (64 x $30)	1,920.00
Hourly basis (64 x $2.50)	160.00
	$4,167.40

B. *One Year (52 programs, one-half hour duration)*

Loops (assumed to be existing)		No charge
Mileage (10,277 x $.20 x 52)		$106,680.80
Switching		
1st Program (64 x $.50)	32.00	
Intermediate Program, (64 x $1 x 50)	$3,200.00	
Last Program (64 x $.50)	32.00	
		3,264.00
Station connection—		
Monthly basis (64 x $20 x 12)		23,040.00
Hourly basis (64 x $2.50 x 52)		8,320.00
Total charge for one year		$141,504.80

[fol. 345p] One year covering 52 weekly programs would consist of twelve months—four months containing five programs each and eight months containing four programs each. Charges for a month containing five programs, and for a month containing four programs, would be as follows:

	Five Program Month	Four Program Month
Loops (assumed to be existing)	No charge	No charge
Mileage (10,277 x $.20 x 5)	$10,277.00	
(10,277 x $.20 x 4)		$8,221.60
*Switching (64 x $1 x 5)	320.00	
(64 x $1 x 4)		256.00
Connection (64 x $30)	1,920.00	1,920.00
Operation (64 x $2.50 x 5)	800.00	
(64 x $2.50 x 4)		640.00
	$13,317.00	$11,037.60

Costs Involved in Changing Origination Point of Program

In connection with changing the origination point of the program, two situations must be distinguished.

*Switching charge will be reduced by $32 for first month and $32 for last month since no charge is applied for connecting the local loop to the connection for the first program and no charge is applied for disconnecting the Local loop from the connection on the last program.

(a) Originating the program in its entirety at Los Angeles rather than New York; and,

(b) Providing for the origination of the program either at New York or at Los Angeles, or part in one city and part in the other, as the individual broadcast require.

In the case of (a) above, assuming that the weekly program originates in its entirety at Los Angeles rather than New York, the same conditions would apply as in the case of the program originating in its entirety at New York. The same charges would be applicable as in the case of both the 54-station and the 64-station networks set forth above.

In the case of (b) above, using the facilities included in the above charges for both the 54 and the 64-station networks, it would not be possible during an individual broadcast to originate part of the program at Los Angeles and part in New York. However, if the customer desired such [fol. 345q] an arrangement, this could be done by providing an additional circuit from Los Angeles to New York, which is at present available and over which the Los Angeles portion of the program would be sent to New York and transmitted over the network from that point. Such additional circuit for either the 54 or the 64-station network would cost $553.60 for the first weekly program within any given month, this charge being made up as follows:

Local loops (assumed to be existing)	No charge
Mileage Charge (2,438 mi. x $.20)	$487.60
Station Connection Charges—Monthly Basis ($30 x 3)	60.00
Station Connection Charges—Hourly Basis ($2.50 x 2)	5.00
Switching Charge (2 at $.50)	1.00
Total	$553.60

For succeeding programs within the same month, the charge would be $494.60 made up as follows:

Local Loops (assumed to be existing)	No charge
Mileage Charge (2,438 mi. x $.20)	$487.60
Station Connection Charges—Hourly Basis ($2.50 x 2)	5.00
Switching Charges (4 at $.50)	2.00
Total	$494.60

The above statements regarding the availability of circuits are based upon a request for one such network and predicated upon present conditions.

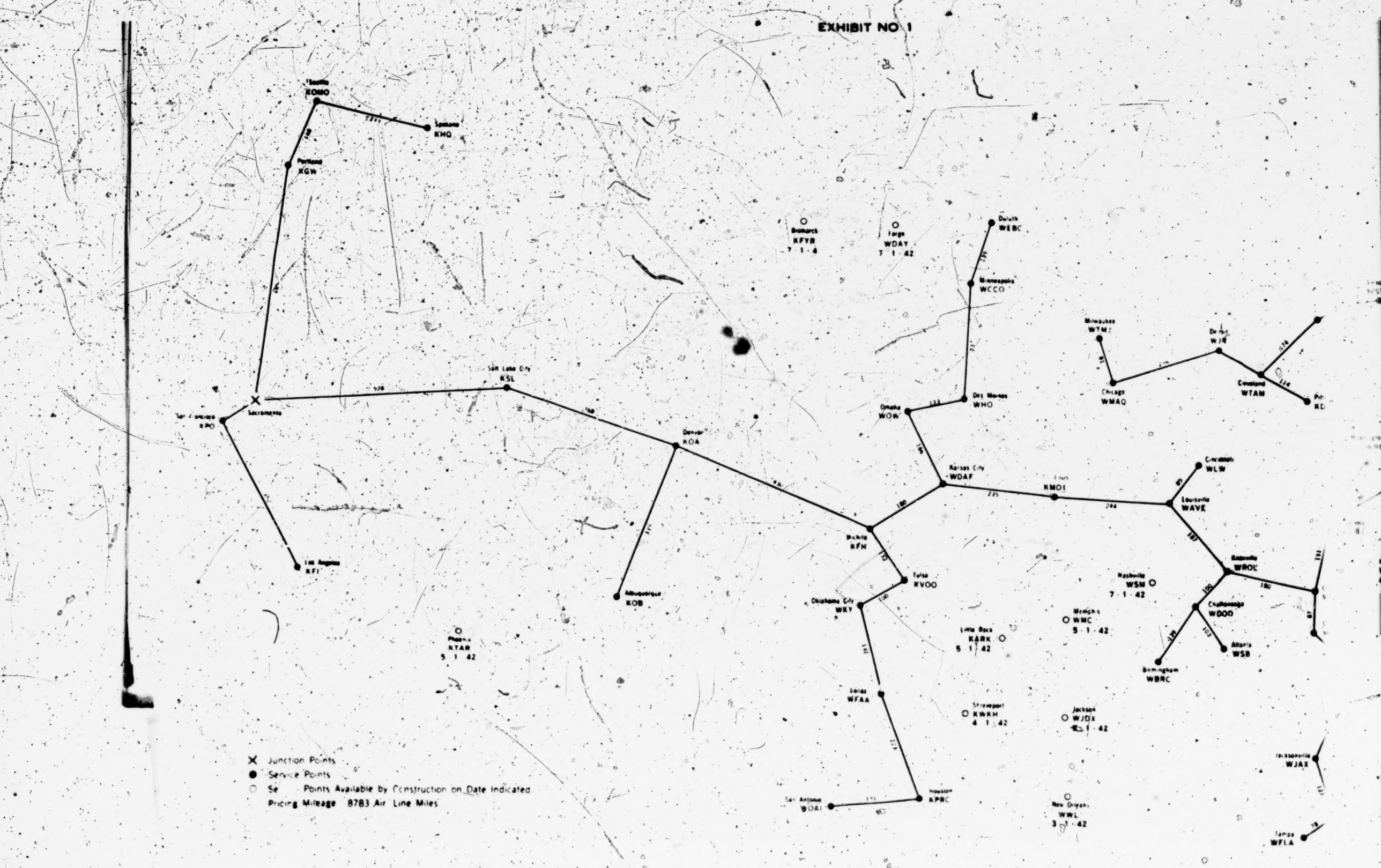
(Signed) Harold C. Read, Program Service Manager.

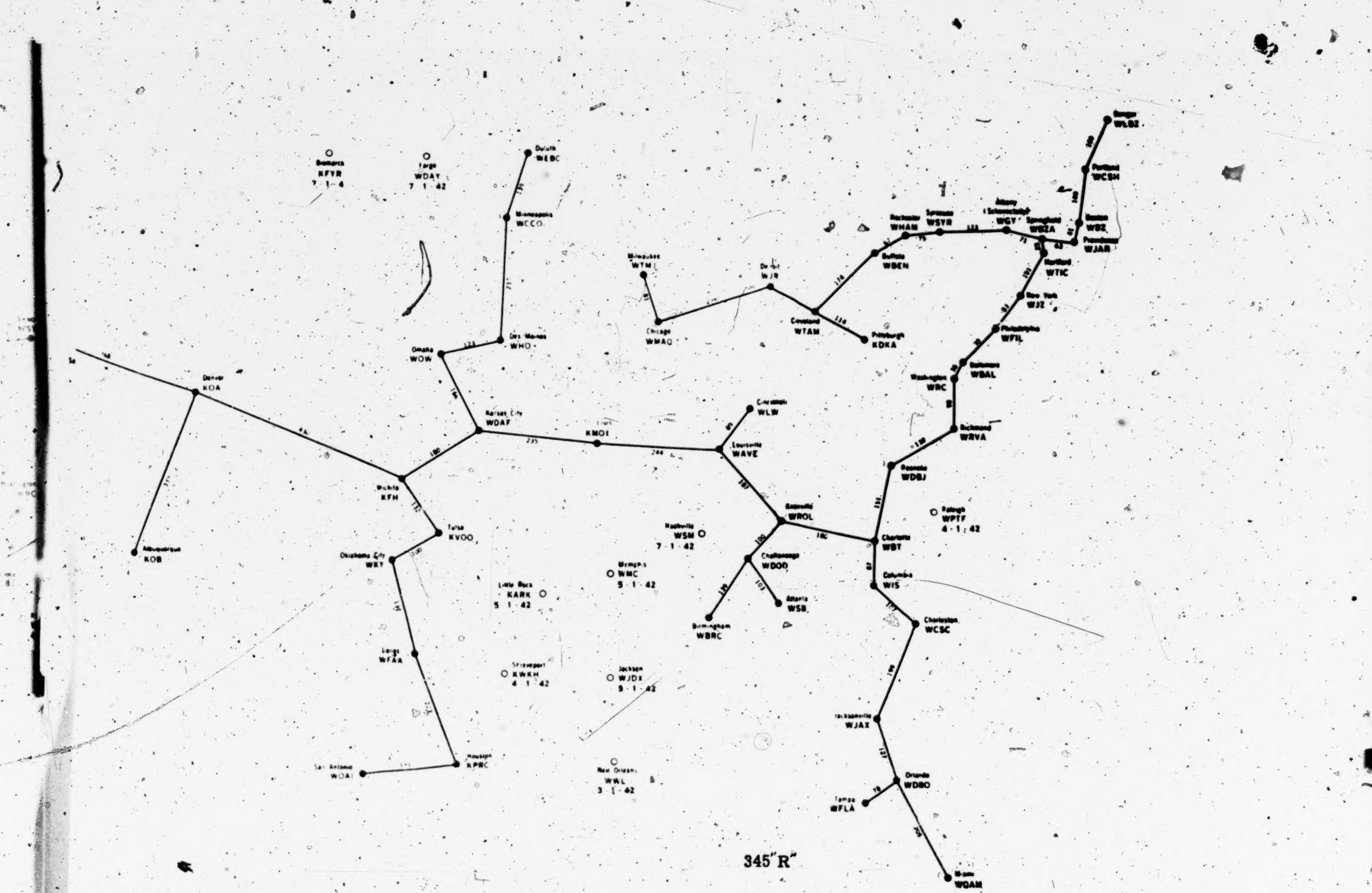
Subscribed and sworn to Before Me This 25th Day of November, 1941.

(Signed) William John Keener, Notary Public, Nassau County, No. 833 (Seal.) Cert. filed in N. Y. County, N. Y. Co. Clk's No. 130. Reg. No. 2K-112. Commission expires March 30, 1942.

(Here follows 2 Photolithographs, Side folios 345r-345s)

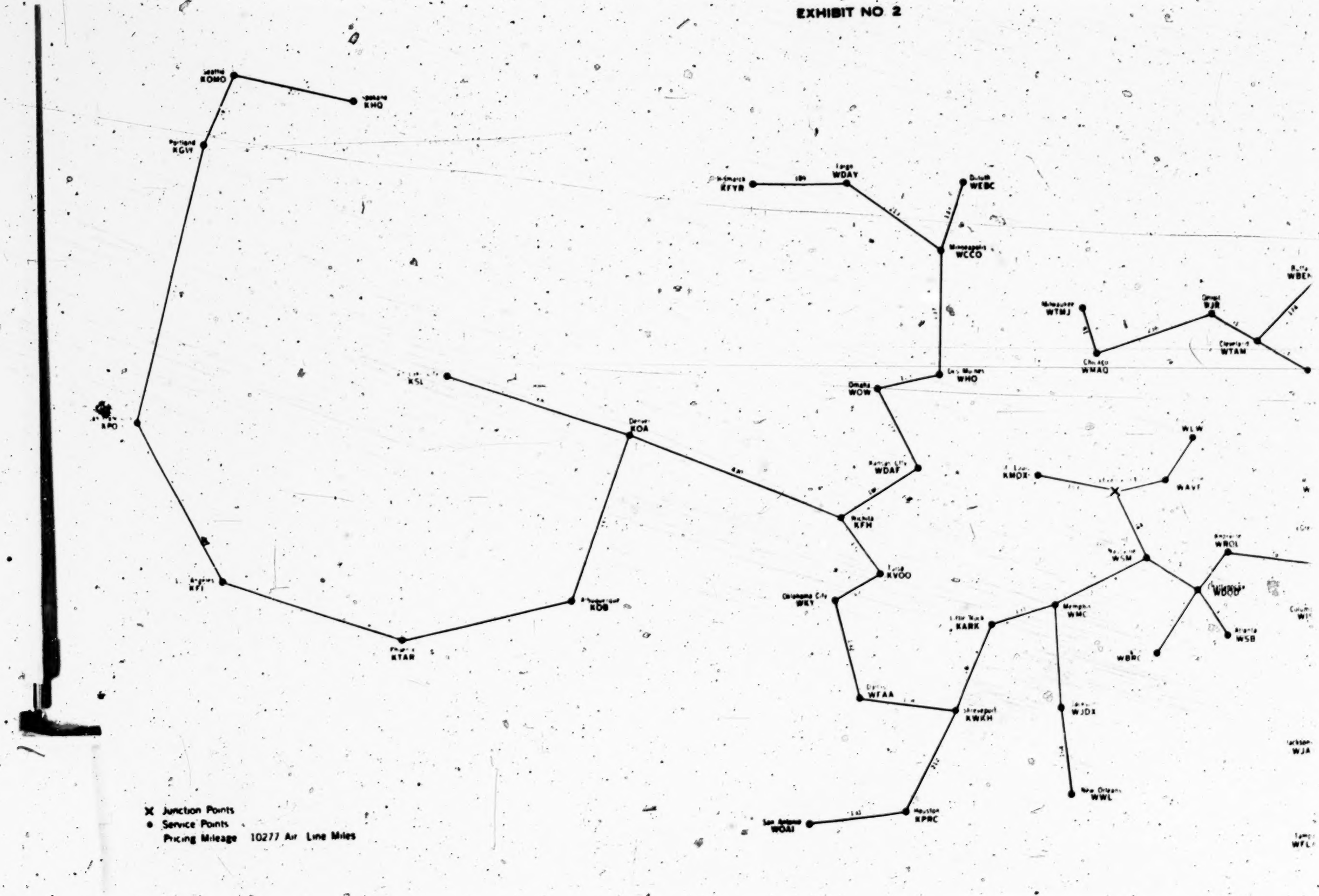
EXHIBIT NO. 1


Seattle
KOMO
Spokane
KHQ
Portland
KGW
Salt Lake City
KSL
Sacramento
Denver
KOA
Los Angeles
KFI
Albuquerque
KOB
Phoenix
KTAR
5 - 1 - 42
Bismarck
KFYR
7 - 1 - 4
Fargo
WDAY
7 - 1 - 42
Duluth
WEBC
Minneapolis
WCCO
Des Moines
WHO
Omaha
WOW
Kansas City
WDAF
KMOX
Louisville
WAVE
Cincinnati
WLW
Pittsburgh
KFH
Tulsa
KVOO
Oklahoma City
WKY
Dallas
WFAA
San Antonio
WOAI
Houston
KPRC
Little Rock
KARK
5 - 1 - 42
Memphis
WMC
5 - 1 - 42
Nashville
WSM
7 - 1 - 42
Knoxville
WROL
Chattanooga
WDOD
Atlanta
WSB
Birmingham
WBRC
Shreveport
KWKH
4 - 1 - 42
Jackson
WJDX
5 - 1 - 42
New Orleans
WWL
3 - 1 - 42
Jacksonville
WJAX
Tampa
WFLA
Milwaukee
WTMJ
Chicago
WMAQ
Detroit
WJR
Cleveland
WTAM
Pittsburgh
KD
X Junction Points
● Service Points
○ Se Points Available by Construction on Date Indicated
Pricing Mileage 8783 Air Line Miles


Bismarck
KFYR
7 - 1 - 4
Fargo
WDAY
7 - 1 - 42
Duluth
WEBC
Minneapolis
WCCO
Des Moines
WHO
Omaha
WOW
Kansas City
WDAF
KMOX
Cincinnati
WLW
Louisville
WAVE
Denver
KOA
Albuquerque
KOB
Wichita
KFH
Tulsa
KVOO
Oklahoma City
WKY
Dallas
WFAA
San Antonio
WOAI
Houston
KPRC
Little Rock
KARK
5 - 1 - 42
Shreveport
KWKH
4 - 1 - 42
Memphis
WMC
5 - 1 - 42
Nashville
WSM
7 - 1 - 42
Jackson
WJDX
5 - 1 - 42
New Orleans
WWL
3 - 1 - 42
Milwaukee
WTMJ
Chicago
WMAQ
Detroit
WJR
Cleveland
WTAM
Pittsburgh
KDKA
Buffalo
WBEN
Rochester
WHAM
Syracuse
WSYR
Albany (Schenectady)
WGY
Springfield
WBZA
Boston
WBZ
Providence
WJAR
Portland
WTIC
New York
WJZ
Philadelphia
WFIL
Washington
WRC
Baltimore
WBAL
Richmond
WRVA
Roanoke
WDBJ
Greensboro
WBIG
Raleigh
WPTF
4 - 1 - 42
Charlotte
WBT
Columbia
WIS
Asheville
WWNC
Chattanooga
WDOD
Atlanta
WSB
Birmingham
WBRC
Charleston
WCSC
Jacksonville
WJAX
Orlando
WDBO
Tampa
WFLA
Miami
WQAM

345"R"

EXHIBIT NO. 2



X Junction Points
• Service Points
Pricing Mileage 10277 Air Line Miles

Bismarck KFYR

Fargo WDAY

Duluth WEBC

Minneapolis WCCO

Des Moines WHO

Omaha WOW

Denver KOA

Kansas City WDAF

Wichita KFH

Fargo KVOO

Oklahoma City WKY

Dallas WFAA

Shreveport KWKH

San Antonio WOAI

Houston KPRC

Little Rock KARK

Memphis WMC

New Orleans WWL

WJDX

WSM

WLW

WAVE

KMOX

WMAQ

Milwaukee WTMJ

Detroit WJR

Cleveland WTAM

Pittsburgh KDKA

Buffalo WBEN

Rochester WHAM

Syracuse WSYR

Albany (Schenectady) WGY

Springfield WBZA

Boston WBZ

Providence WJAR

Bangor WLBZ

Portland WCSH

Hartford WTIC

New York WJZ

Philadelphia WFIL

Washington WRC

Baltimore WBAL

Richmond WRVA

Greensboro WDBJ

(Durham) Raleigh WPTF

Charlotte WBT

Columbia WIS

Jacksonville WJAX

Orlando WDBO

Tampa WFLA

Miami WQAM

Atlanta WSB

Birmingham WBRC

Nashville WSM

Chattanooga WDOD

Knoxville WROL

Richmond WRVA

Columbia WCSC

345°S°

[fol. 346] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF TELFORD TAYLOR IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

DISTRICT OF COLUMBIA, ss:

TELFORD TAYLOR, being duly sworn says:

(1) That he is the General Counsel of the Federal Communications Commission and as such is familiar with the Commission's proceedings taken under Order No. 37, Docket No. 5060.

(2) The said proceedings are as set forth in affiant's affidavit annexed to defendants' Motions to Dismiss the Complaint, or in the Alternative, for Summary Judgment, dated November 5, 1941.

(3) A certified copy of said proceedings has heretofore been filed with this Court in conjunction with defendants' Motions to Dismiss the Complaint, or in the Alternative, for Summary Judgment. It is incorporated herein by reference as Exhibit A.

(4) Affiant submits that Exhibit A is relevant on the issues sought to be raised by plaintiff's Motion for Preliminary Injunction and shows that said Motion should not be granted.

(Signed) Telford Taylor.

Subscribed to and sworn before me this — day of December, 1941. —— ——, Notary Public.

[fol. 347] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRED WEBER, GENERAL MANAGER OF MUTUAL BROADCASTING SYSTEM, INC., IN OPPOSITION TO MOTIONS FOR PRELIMINARY INJUNCTION

STATE OF NEW YORK,
County of New York, ss:

Fred Weber, first being duly sworn, on oath deposes and says:

I

Affiant

Affiant is, and since the organization of Mutual in the fall of 1934 has been, in the employ of Mutual Broadcasting System, Inc. (herein referred to as "Mutual"), with the title of coordinator until 1936, and since then with the title of general manager. Affiant is, and since the outset has been, a member of the Board of Directors of Mutual. Subject to the authority of the Board of Directors and the corporate officers of Mutual, none of whom (except the auditor) is paid any salary or other compensation by Mutual, affiant has at all times been, and is, the principal executive officer of Mutual, with active duties ranging over the entire field of Mutual's activities and operations. From 1926 to 1933 affiant was in the employ of plaintiff, National Broadcasting Company, Inc., serving successively in the commercial engineering, stations relations, and sales departments of that company. In 1933 affiant became vice-president and general manager of American Broadcasting System, a company which was organized in that year and which for a period of six months attempted without success to operate a national network. By reason of his past and present experience and duties, affiant is thoroughly familiar with the business of network broadcasting, embracing, and with particular reference to, its competitive aspects, including present and past efforts, practices, and policies of the several national network organizations, in competing with each other in the sale of time to advertising agencies, advertisers, and others, and in securing desirable [fol. 348] independently-owned broadcasting stations located in cities throughout the United States and elsewhere in North America to serve as network affiliates and as outlets for the broadcasting of network programs. Affiant appeared as a witness in behalf of Mutual in the proceedings before the Commission now under review (see transcript of record, pages 5116-5230 and 8249-8298) and actively participated in the preparation of exhibits and generally of Mutual's presentation before the Commission. Affiant also testified in behalf of Mutual at the hearing before the Senate Committee on Interstate Commerce on the so-called White Resolution (S. Res. 113) in June, 1941, on the subject-matter of the Commission's order now before this

Court. Affiant has read and is familiar with the contents of the affidavits of Niles Trammell, William S. Paley and others heretofore filed with this Court in support of the motions of plaintiffs National Broadcasting Company, Inc., and Columbia Broadcasting System, Inc. (hereinafter referred to as National and Columbia) for temporary injunction and temporary restraining order, and makes this affidavit in opposition to said motions.

II

Mutual Broadcasting System, Inc.

1. *Corporate organization.* Mutual is an Illinois corporation organized October 29, 1934, with its principal office in Chicago, Illinois. The facts with respect to its history, business, and corporate organization from the date of its incorporation are correctly set forth in the Commission's Report on Chain Broadcasting of May 2, 1941 (at pages 26 to 28) as of that date. Mutual has outstanding a total of 99 shares of common stock (out of an authorized total of 500 shares of common stock, there being no other class of stock), held by seven stockholders, each of whom (with the exception of Colonial, noted below) directly owns and operates one or more broadcast stations, and two of whom (Colonial and Don Lee) operate regional networks, as follows:

[fol. 349]

Shareholder	Number of Shares	Call Letters of Station or Stations	Location of Station
WGN, Inc.	25	WGN	Chicago, Ill.
Bamberger Broadcasting Service, Inc.	25	WOR	New York, N. Y.
Don Lee Broadcasting Co.	25	KHJ	Los Angeles, Cal.
		KFRC	San Francisco, Cal.
		KGB	San Diego, Cal.
		KDB	Santa Barbara, Cal.
Colonial Network, Inc.*	6	WAAB	Boston, Mass.
		WNAC	Boston, Mass.
		WEAN	Providence, R. I.
		WICC	Bridgeport, Conn.
United Broadcasting Co.	6	WHK	Cleveland, O.
		WCLE	Cleveland, O.
		WHKC	Columbus, O.
Cincinnati Times-Star Co.	6	WKRC	Cincinnati, O.
Western Ontario Broadcasting Co., Ltd.	6	CKLW	Windsor, Canada (in the Detroit area)

*Colonial Network, Inc., is not the licensee of the four stations set opposite its name. The licensee of these stations is Yankee Network, Inc., a corporation owned by the same interests.

Steps have been taken as a result of which one or more of four of the foregoing (Colonial, United, Western Ontario, and Cincinnati Times-Star) may have their shareholdings increased from 6 shares to 25 shares each (the matter being at present in process of negotiation and study), and four other concerns will or may be added to the list of shareholders, with either 6 shares or 25 shares each, owning and operating broadcast stations affiliated with Mutual as follows:

Prospective Shareholder	Call Letters of Station or Stations	Location of Station
Pennsylvania Broadcasting Co	WIP	Philadelphia, Pa.
WCAE, Inc	WCAE	Pittsburgh, Pa.
Baltimore Radio Show, Inc.	WFBR	Baltimore, Md.
Buffalo Broadcasting Corporation	WGR	Buffalo, N. Y.

Mutual has a Board of Directors with nine members, based on representation of the shareholders in proportion to their shareholdings, and also including affiant. Pursuant to its cooperative purposes and character, and to insure a fair representation of the interests and points of view of its shareholders and affiliates, as well as of the various communities and sections of the United States, Mutual, in addition to the representation of its shareholders on its Board of Directors, maintains an Operating Board composed of rep- [fol. 350] resentatives of all its present and prospective shareholders and also two representatives of affiliates other than shareholders.

2. *Sources of revenue.* Mutual's expenses of operation are met through funds derived (a) from commissions retained by Mutual out of sums received from advertisers and others for use of time over the stations constituting the Mutual network, together with specific contributions from shareholders and affiliates for wire-line expenses, and (b) from contributions from Mutual's shareholders fixed in accordance with contracts between them and Mutual.

III

Mutual Network Operations

1. *General scope and character.* Like its older competitors, National and Columbia, Mutual is engaged in the operation, and in performing all the functions, of a national

network organization, both within the definition accepted by the Commission in its Report and within the definition generally accepted in the industry and according to popular usage. Like said competitors, Mutual is engaged in supplying a daily network program service consisting of both commercial and sustaining programs, totalling over 112 hours a week over a system of telephone wire-lines to broadcast stations scattered over a large part of the United States. In addition, this program service is supplied continuously to one station in Canada, is made available, and to a substantial extent is used by, many other stations in Canada, and in part, is supplied to stations in Hawaii by radio.

2. *Broadcast stations affiliated with Mutual.* Beginning in the fall of 1934 with an association of four broadcast stations located in New York, Chicago, Detroit, and Cincinnati, and expanding by gradual steps into a network of national scope and character, Mutual now has (as of November 1, 1941) a total of 190 brodacast stations in the United States, Canada, Alaska and Hawaii. A correct list of these stations, together with data as to the power, frequency and hours of operation of the stations, the cities in which they are located and the population thereof, and their primary affiliations, if any, with National and Columbia, appears in [fol. 351] Appendix A, attached hereto. This total includes stations owned by its shareholders, stations affiliated with certain regional networks which in turn are either shareholders of Mutual or are affiliated with it, and other independently-owned stations not falling within either classification. While the list of affiliated stations appears large, actually, in terms of effective use as outlets for network programs, the network is under severe handicaps. These are due primarily to the fact that, as hereafter more fully appears, the restrictive provisions in the contracts between National and Columbia, condemned in the Commission's Report and forbidden by the Regulations now under review, completely bar Mutual from many important cities and markets, and entirely or largely bar Mutual during the more desirable broadcasting hours from many other important cities and markets, or make Mutual's access thereto subject to such conditions and uncertainties as to burden it with a heavy competitive disadvantage. In addition, as appears in Appendix A, Mutual's list of affiliated

stations contains relatively few stations of high or medium power with large coverage; it is largely made up of stations of low power and limited coverage. Many of them are in smaller cities which Mutual's competitors have passed over. In a number of instances groups of several such stations are necessary to furnish coverage even partially approaching that of single stations of larger power affiliated with either of said competitors. Appendix B, attached hereto, contains a comparison of the stations affiliated with each of the four national networks in these respects.

3. *Wire-lines for transmission of network programs.* Like its said competitors, Mutual maintains an extensive and virtually nationwide system of telephone wire-lines suitable and continuously available for the transmission of network programs from the places of origination to the stations constituting the network, the total mileage of said circuits being approximately 15,000 miles, at an annual cost of $1,200,000. These wire-lines are, for the most part, leased directly from the telephone company by Mutual but, in some instances, are secured by virtue of arrangements between Mutual and certain of its shareholders and affiliates who, in turn, lease the wire-lines from the telephone company. Mutual's wire-line system compares favorably with the wire-line systems of National and Columbia in mileage [fol. 352] and costs [1] and, to the extent that it is less, it is due somewhat to the fact that Mutual is a younger network but more to the effect of the restrictive provisions in the National and Columbia contracts barring Mutual from many communities and regions. In addition to its regular wire-line system, whenever necessary or desirable, Mutual arranges for additional circuits on a temporary basis to supply to the network programs originating at points not on the network, and similarly for transmission by radio or wire to the United States of programs originating in foreign countries for use over its network.

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[1] According to Trammell's affidavit, page 13, "NBC's wireline expenses in 1940 aggregated in excess of $3,600,000" for *two* national networks. According to Paley's affidavit, page 9, the cost is "over $2,000,000 a year." Both these figures apparently include the cost of special, local, occasional or temporary lines in addition to those used regularly as part of the network systems.

4. *Mutual's network program service—general.* Like its said competitors, Mutual supplies a network program service, consisting of both commercial and sustaining programs, to its affiliated stations. This service averages not less than 16 hours daily or a total of over 112 hours weekly. Frequently, additional hours of program service are supplied, including, on some occasions, service throughout the entire 24 hours of the day for the covering of events of major importance. The network program service thus supplied by Mutual is substantially the same in continuous character, content, quantity, quality, and expense of production as the network program services supplied by National and Columbia to their respective affiliates, differing only as (but not to the extent that) would be naturally expected of a younger organization having a smaller volume of business and suffering from the competitive handicaps imposed by National and Columbia's restrictive contracts.

5. *Commercial network programs.* Like its said competitors, Mutual is engaged in selling time on the stations constituting its network to advertisers, usually through advertising agencies (in most instances through a sales organization maintained by Mutual but, in some instances, through sales organizations maintained by its shareholders [fol. 353] or affiliates), for commercial network programs, to be supplied over the Mutual telephone wire-line circuits to as many of the stations as the advertiser can be persuaded to pay for. Because Mutual is a younger network, and more particularly because of the obstacles created by National's and Columbia's restrictive contracts, Mutual has not been able to, and does not provide, as great a volume of commercial network programs to its affiliated stations as do its said competitors, but there is otherwise no substantial difference in the commercial network program service supplied by Mutual and that supplied by its said competitors. As is the case with the latter, and in substantially the same manner, most of Mutual's commercial network programs are largely produced and paid for by the advertising agency and not by the network organization. Those not so produced are, in the case of Mutual, produced principally at the stations and by the staffs and facilities of Mutual's shareholders, chiefly at New York, Chicago, and Los Angeles, in substantially the same manner, and

with the same results, quality, and effects, as those produced at the so-called key stations of said competitors.

6. *Sustaining network programs.* Like its said competitors, Mutual is engaged in supplying a sustaining program service to its affiliated stations during hours not occupied by commercial network programs. This sustaining program service exceeds 84 hours weekly and consists, in general, of the same character of cultural, educational, religious and public service programs as those supplied by its said competitors, and differs only in that (1) because of its smaller volume of commercial network programs Mutual furnishes a greater volume of sustaining network programs in terms of hours per week than do its competitors, and (2) because, with certain exceptions (consisting principally of broadcasts of news and special events originating in foreign countries), such sustaining programs are produced not by Mutual as a corporate entity but by its shareholders and affiliates, principally those at New York, Chicago and Los Angeles, but also, to a substantial extent, by its shareholders and affiliates elsewhere. The selection of sustaining programs to be supplied to the network is made by Mutual through a competent staff by choosing the best from all such programs broadcast or proposed to be broadcast by its shareholders and affiliates. The actual annual [fol. 354] cost of production of such sustaining programs compares favorably with the sustaining program costs of National and Columbia.[2] In the production of sustaining programs, the studios, staffs and equipment of Mutual's principal shareholders serve substantially the same pur-

[2] According to Trammell's affidavit, page 15, National's *two* national networks, the Red and the Blue, "required the expenditure of more than $3,000,000 for talent and material alone." According to Paley's affidavit (p. 10) "In 1940 alone, CBS expended in excess of $5,000,000 on sustaining programs." This latter figure, however, includes an arbitrary allocation of Columbia's overhead, administrative expenses, wire-line rentals, etc. The cost of producing simply those of Mutual's sustaining programs (in terms of talent and material alone) which originate at WOR, New York, WGN, Chicago, and KHJ, Los Angeles, exceeds $1,250,000 annually and, when the cost of sustaining programs at other points is added, substantially exceeds this figure.

poses and perform substantially the same functions as the so-called key stations of its competitors.[3] The Mutual method of supplying sustaining programs has several recognized and demonstrated advantages in that (1) it encourages shareholders and affiliates, with stations in many parts of the country, to produce good sustaining programs in the expectation that they will be accepted on the network and broadcast to a nation-wide audience, with appropriate credit in each instance to the station and the locality originating the program, instead of having the function of providing sustaining programs appropriated entirely by the network organizations,[4] (2) through the Mutual system of compensation to stations hereinafter described, funds are provided to shareholders and affiliates for this purpose instead of being retained by the network corporation,[5] (3) [fol. 355] the public is provided with a highly desirable diversity of points of program origination, and (4) the tendency toward undue concentration of talent and facilities for the production of programs in two or three large cities is materially neutralized. The excellent and varied character of Mutual's sustaining program service, provided in this manner, appears from the listings of regular sustaining features supplied over its networks and by the fact that in several instances where a station is or has been affiliated with both National's Blue Network and the Mutual network, the affiliate has frequently taken more hours of the Mutual sustaining service than it has of National's sustaining service. Statements and insinuations disparaging either the quantity or quality of this service, such as those appearing in Mr. Paley's affidavit (at pages 6-8, 29-30) and Mr. Trammell's affidavit (at page 7), are simply contrary to well-known or easily ascertainable facts.

7. *Ownership of stations, studio facilities, etc.* Unlike its said competitors, Mutual, as such, does not own or

[3] It is to be noted that at one of the principal points of program production, Los Angeles, National does not own or operate any station.

[4] Mutual's programs originate at an average of not less than 18 different cities each week (Transcript of Record p. 5267).

[5] As stated in Paley's affidavit (p. 5), "The quality of sustaining programs can be improved by the individual station when its revenues from advertising increase."

operate any broadcast station. As appears from what has already been stated, however, the broadcast stations of certain of its shareholders, principally those in New York, Chicago, and Los Angeles, but to some extent also the broadcast stations of the other shareholders and of certain of Mutual's affiliates (including its affiliate WOL at Washington, D. C.) serve substantially the same purposes and perform substantially the same functions as the so-called key stations of National and Columbia,[6] so far as they are either necessary or desirable for successful network operation. The stations which serve such purposes for Mutual have elaborate studios in buildings specially built or [fol. 356] adapted for the purpose, maintain competent engineering staffs, and maintain ample facilities for the production of programs, which compare favorably to those of National's and Columbia's so-called key stations, and in some instances and in some respects, are superior thereto. Charges such as those made in Mr. Paley's affidavit (pp. 7-8, 30), that

"Mutual has no studios, maintains no engineering department, neither owns nor maintains any facilities for the production of programs and does not originate or produce a network program service such as is maintained by CBS and NBC"

apply only to Mutual as a separate corporate entity and are distinctly untrue of Mutual in its operation as a network.

8. *Basis of compensation to stations.* Unlike its competitors, Mutual has not attempted, and does not attempt, to fix, by contract or otherwise, the rates to be charged

[6] It is to be noted, for example, that National does not own or operate a station at one of the principal production points, i. e., Los Angeles, and that National and Columbia each own and operate stations at cities in which the other does not own or operate a station (e.g., at Cleveland, St. Louis, Minneapolis, Charlotte, Denver, and San Francisco). It is to be also noted that, at each of their stations, including the so-called key stations, both National and Columbia sell substantial amounts of time for local or national spot commercial programs and, in the periods thus sold, do not broadcast their excellent sustaining programs.

advertisers and others for the use of time over stations constituting its network. The rates charged by Mutual are simply the sum total of the rates of the stations used, save only in the case of certain volume discounts, but even in such case the discounts are also based on the stations' rates. Of the sums received from advertisers and others, Mutual retains a commission determined in advance by contract between it and the affiliate which in the normal case is either large enough to include, or is supplemented by, the affiliate's share of the cost of wire-lines to connect it with the Mutual system, and, in the case of shareholders, Mutual also retains each shareholder's agreed contribution toward its expenses of operation. Because of this basis of compensation, Mutual, on the whole, pays to its affiliates a larger proportion of the sums received from advertisers for the use of the affiliates' stations than is paid by National and Columbia, although, because of its smaller total volume of business, the actual total sum paid to its affiliates is, in most instances, less.

9. *Mutual's contracts with affiliates.* Prior to February 1, 1940, Mutual's contracts with its affiliates (with the exception of a net work exclusivity provision with one shareholder and territorial exclusivity provisions with the same shareholder and a few affiliates) did not contain provi- [fol. 357] sions contravening the Commission's Regulations, either in their original form as adopted May 2, 1941, or as amended October 11, 1941. Since February 1, 1940, as is more particularly set forth in the Commission's Report (see particularly pages 35-37) and for the reasons therein stated, Mutual's contracts with its shareholders, its prospective shareholders, and one or two of its other affiliates have contained provisions of exclusivity and of exclusive time-options (from 3¼ to 4¼ specified hours on week days and 6 hours on Sundays) which contravene said Regulations, but the contracts provide that these clauses shall lapse if the Commission prohibits them, or if the other national networks voluntarily abandon them and, at the time the contracts were entered into, Mutual advised the Commission of the fact, of the reasons therefor, and of its willingness and desire to abandon them in the event such Regulations should be adopted. Immediately after the Commission's order of May 2, 1941, Mutual prepared a contract to conform with the Regulations in their origi-

nal form and, on submission thereof to the Commission, secured the Commission's informal approval on June 19, 1941. A copy of this contract appears in the printed Hearings on S. Res. 113 at pages 565-9. Had it not been for the delays thereafter in putting the Regulations into effect, this contract would have been forthwith submitted by Mutual to all its shareholders and affiliates and, as affiant is informed and believes, would have been executed by them and would now be in full force and effect. Among the provisions of the contract, thus informally approved by the Commission, were the following:

"2. Mutual and the Broadcaster will each publicize the Station as the regular Mutual outlet in the city in which the station is located. The station shall have the right to the first call on Mutual network commercial and sustaining programs in said city and Mutual shall not offer any series of programs or single program (not a part of a series) to any other radio station located in said city unless said series of programs or single program has been offered to the Broadcaster for broadcasting through the Station under this contract and the Broadcaster shall have failed or refused to accept such program or programs within forty-eight (48) hours after Mutual's offer. In the [fol. 358] case of a commercial program or a series of commercial programs:

"(a) If the Broadcaster is unable to clear the required period or periods of time on the station for such program or programs but notifies Mutual within said 48 hours that the Broadcaster can clear a mutually satisfactory substitute period or periods and is able and willing to broadcast the program or programs by means of the off-the-line recordings (made by the Broadcaster without cost to Mutual or the advertiser) during such substitute period or periods. Mutual will accept such substitute period or periods, unless the advertiser is unwilling to accept such broadcasting by the Station by means of off-the-line recordings during such substitute period or periods, it being understood that Mutual is not obligated to require the advertiser to accept such delayed broadcasting; and

"(b) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs scheduled to run for 13 weeks or more, or a series of separable

programs, but notifies Mutual within said 48 hours that the Broadcaster will clear said periods of time upon a specified date not later than four (4) weeks after the commencement of the series of programs, Mutual will contract for such periods of time on the Station as of the specified date upon which the Broadcaster is able to clear such periods, unless the advertiser refuses to accept such postponement of broadcasting on the station.

"If the Broadcaster fails or refuses to accept said program or programs or if the Broadcaster is unable to clear the required period or periods of time and Mutual is unable to persuade the advertiser to use a substitute period or periods or to postpone the commencement of such programs on the Station, as provided in the preceding subparagraph, Mutual may contract with any other station located in said city for the broadcasting of said commercial program or programs. In the case of a single sustaining program or series of sustaining programs:

(a) If the Broadcaster is unable to clear the required period or periods of time for such program or programs but notifies Mutual that the Broadcaster will broadcast the program or programs by transcription at a mutually satisfactory substitute period or periods, Mutual will not offer [fol. 359] said program or programs to any other station in said city; and

"(b) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs, Mutual, in offering said series of programs to any other station in said city, will offer said series subject to recapture by the Station on one (1) week's notice to Mutual. It is understood, however, that notwithstanding the foregoing, Mutual may make available to any other station in said city special sustaining programs of great public importance (such as, but not limited to, addresses of the President of the United States.)"

On October 31, 1941, affiant sent to each of Mutual's shareholders and prospective shareholders a letter, a copy of which is attached hereto as Appendix C, and an informal interim agreement, a copy of which is attached hereto as Appendix D. The last-mentioned agreement was assented to by all of its said shareholders and prospective shareholders and Mutual is now operating thereunder without experiencing any difficulty or inconvenience by reason of

any provision based on, or required by, the Regulations. Shortly thereafter, Mutual completed preparation of another contract to conform to the amended Regulations of October 11, 1941, a copy of which is attached hereto as Appendix E. Had it not been for subsequent delays in the effective date of the amended Regulations, due to the motions of plaintiffs now under consideration and to the stipulation between plaintiffs and the Commission, this contract would already have been submitted to Mutual's shareholders and affiliates and, as affiant is informed and believes, would have been executed by them and would now be in full force and effect.

IV

Mutual's Attempts to Secure Interim Relief in the Proceedings Before the Commission

1. *Initiation of the proceedings.* As stated in the Commission's Report (page 1), the proceedings before the Commission commenced with the Commission's Order No. 37, adopted March 18, 1938. Neither Mutual, nor, so far as is known to affiant, any officer, employee or representative of Mutual had made any complaint to the Commission [fol. 360] on the subject-matter of the proceedings, or had taken any step which led or had any part in leading the Commission to initiate the proceedings.

2. *Participation in the hearing.* As was the case of its competitors, pursuant to notice by, and request from, the Commission, Mutual entered its appearance and thereafter presented evidence before the Committee in charge of the hearing. Its witnesses (including affiant), to the best of their ability, produced the facts and information called for by the Commission's notice or requested by its counsel. The evidence presented in behalf of Mutual appears principally at pages 4845 to 5428 (February 7 to 14, 1939) and pages 8249 to 8298 (April 18, 1939) of the transcript of record, and in Exhibits Nos. 368 to 435. The hearing extended from November 14, 1938 to May 19, 1939.

3. *Mutual's motion of April 19, 1939.* The injuries to Mutual and its affiliated stations resulting from the restrictive contracts of National and Columbia having steadily persisted and increased during the course of the hearing, and the threatened future injuries appearing likely to become

greatly aggravated through the increasing activities of National and Columbia (both of which organizations were, in apparent defiance and attempted nullification of the Commission's power and jurisdiction, busily engaged in attempting to secure long-term renewals of their restrictive contracts with affiliates), Mutual, on April 19, 1939, sought interim relief from the Commission through a motion the nature of which, and the arguments presented in support and in opposition, appear at pages 8454-8463 of the transcript of record. In substance, the motion sought the immediate adoption by the Commission of a regulation which would have forbidden licensees to enter into affiliation contracts with network organizations, or into any renewal or extension of existing affiliation contracts, for a period extending beyond December 31, 1940, at least in cities having less than four stations with comparable facilities (R. 8457, 8459). The motion was taken under advisement by the Committee (R. 8463).

4. *Renewal of the motion in July, 1939.* No action having been taken on said motion, on July 6, 1939 Mutual filed a formal motion in writing asking that the Committee recommend to the Commission at an early date the adoption of a regulation in substance as follows:

[fol. 361] "No licensee of a standard broadcast station shall enter into a contract, agreement or other arrangement with any network organization covering or dealing with the affiliation of such licensee's station with the network organization, or into any renewal or extension of any such existing contract, agreement or other arrangement, or exercise any option or other privilege contained in any such existing contract, agreement, or other arrangement for renewal or extension thereof, for a period extending beyond * * *",

suggesting that the date to be specified in the foregoing be such as to allow sufficient time for the conclusion of the proceedings and the issuance of such regulations as might result therefrom. On July 14, 1939, Mutual filed a supplement to said motion incorporating facts and events occurring since the filing of the motion. As appears in greater detail in said motion and supplement as contained in the record, National was in the process of obtaining, and did obtain, an exclusive and time-option contract with respect

to WLW, a 50 kw. clear channel station which had theretofore been free of such restrictions and had been Mutual's affiliate in Cincinnati and one of its basic and most important outlets. Mutual was thereafter completely excluded from said station. The contract was secured by National, as affiant is informed and believes, with the primary intent and purpose of crippling Mutual as a competitor [7] by depriving it of access to one of its most important outlets. No action on said motion or supplement was taken by either the Committee or the Commission.

5. *Renewal of the motion on July 17, 1940.* The Committee having made its report to the Commission on June 12, 1940, and the injuries to Mutual resulting from the restrictive contracts having persisted and increased, Mutual renewed its motion formally and in writing on July 17, 1940, as appears more fully from the record. No action, however, was taken by the Commission on the motion further than to announce in a release issued July 26, 1940 that the [fol. 362] advisability of adopting the temporary regulation requested by Mutual was one of the subjects to which briefs should be directed. No temporary or interim relief having been granted to Mutual, the Commission on May 2, 1941, over 3 years after initiating the proceedings, adopted the Regulations which, as later amended on October 11, 1941, are now sought to be further delayed from going into force and effect.

V

Irreparable Injury to Mutual Through Maintenance of Restrictive Contracts

1. *The contract provisions involved.* The provisions in contracts between National and Columbia and their respective affiliates which have caused, are now causing, and will cause great and, affiant believes, irreparable injury to Mutual are those forbidden by Regulations 3.101 and 3.104 of the Commission, as amended, and, to an incidental but nonetheless important extent, those forbidden by Regulation

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[7] Thereafter, after sale by Columbia of a station (WKRC3, theretofore owned and operated by it in Cincinnati, to Cincinnati Times-Star Co., Mutual obtained an outlet in that city.

3.103. These contract provisions, generally described, consist in

a) provisions by which the affiliate agrees not to broadcast the programs of any other network organization;[8]

b) provisions by which the affiliate grants to the network organization an exclusive option, exercisable on 28 days' [fol. 363] notice, either on all its hours of operation,[9] or on its more desirable hours in the morning, afternoon, and evening periods;[10] and

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[8] Such provisions are contained in virtually all contracts between Columbia and its affiliates and, at least until recently, have been contained in contracts between National and some 35 of its affiliates. From the fact, however, that all mention of the exclusivity clause is omitted from National's complaint (see par. 21 at p. 7 of the Complaint), that the form of affiliation contract attached to the Complaint as Exhibit A contains no such clause, and from the omission of Trammell's affidavit to mention or to justify such a clause, affiant is led to believe that National has abandoned the exclusivity feature. Affiant is informed that on or about December 4, 1941, National advised its affiliates that it has abandoned this feature of its contracts.

[9] Such provisions are contained in contracts between National and not less than 30 affiliates in the western part of the United States, including the Pacific Coast, and in contracts between Columbia and virtually all its affiliates. Beginning about 1937 Columbia has introduced an apparent limitation in its contracts which has since then been extended to most of them, namely, that the total amount of time per week upon which Columbia may exercise its option shall not exceed 50 "converted" hours (the equivalent of approximately 79 clock hours in actual practice, since 2 daytime hours are deemed the equivalent of one evening hour). Since the hours under option are not specified, however, the Columbia provision is the equivalent of an option on *all* the station's time until the maximum is reached.

[10] Such provisions are contained in practically all the remaining contracts between National and its affiliates, and cover the hours from 10 a. m. to 12 noon, from 3 p. m. to 6 p. m., from 7 p. m. to 7:30 p. m., and from 8 p. m. to 11 p. m.

c) provisions by which the term of such contracts is fixed at a period of 5 years or more.[11]

in addition, the ownership by National and Columbia of broadcast stations in certain communities, more particularly in two communities served by less than four full-time broadcast stations (covered by Regulation 3.106) has had the same restrictive effect, but, in order not to complicate the dicussion, such ownership will not be separately treated in this affidavit.

2. *The limited number of broadcast stations in many cities.* While there are, as of November 1, 1941, 877 broadcast stations in licensed operation in the United States,[12] many of these stations are wholly or partly unsuitable or unavailable as network outlets, because of their non-commercial character, or because of restrictions on their hours [fol. 364] of operation (e. g., stations required to close down at sunset or shortly thereafter), or because of inadequate coverage to serve the cities in which they are located (due to low power or undesirable frequency or interference), or because they are located in towns which are too small to be attractive to advertisers or are within areas served by four or more stations. There are only approximately 21 cities adequately served by 4 or more full-time broadcast stations. Of the remaining cities, approximately 24 are adequately served by 3 full-time broadcast stations; 59 are adequately served by 2 full-time broadcast stations; and, of cities having a population over 50,000, 44 are adequately served by only one full-time broadcast station. A list of cities classified according to the number of full time stations located therein and also according to the number of full time stations from which such cities receive adequate service is set forth in Appendix F, attached hereto. Many of the cities adequately served by only 3 full-time stations, some of the cities adequately served by only 2 full-time stations, and a few of the cities adequately served by only 1 full-time station, are of large or substantial population, or are the centers of recognized trade areas, constituting attractive markets for national advertisers. Because of

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[11] This is true of nearly all contracts between National and Columbia and their respective affiliates.

[12] In addition, as of November 1, 1941, construction permits were outstanding for 38 new stations.

technical reasons having to do with the limited frequencies available for use by broadcast stations, and limitations on the extent to which two or more stations can operate simultaneously on the same or adjacent frequencies without undue interference, it is, generally speaking, impossible in the present or any immediately foreseeable future state of the art to provide additional full-time stations in such cities.

3. *Effect of contract provisions on network access to markets.* With four national networks in operation, the effect of the contract provisions above described is that in any city having less than four full-time stations, one (or more) of the networks is either entirely or largely barred from access for its program service to the city and its environs, and from offering coverage of the city and its environs to any national advertiser, depending on the type of restrictive provisions in effect with respect to the stations serving such city. Similarly, the listening public in any such city is either entirely or largely barred from access to the program services of such network or networks. [fol. 365] In actual practice, under existing contracts, there are 7 cities (shown in Appendix F) adequately served by only 3 full-time stations in which Mutual's only access is through stations primarily affiliated with National under contracts which, while not containing the exclusivity feature, contain option-time provisions covering most of the station's more desirable hours.[13] In such cities, Mutual's only access has been (a) to the less desirable hours not covered by option, or (b) to the hours covered by option not in actual present use by the network having the option but subject to use by that network on 28 days' notice. In 23 cities served by only 2 full-time stations (shown in Appendix F), Mutual is effectively and as a practical matter denied access because of the restrictive provisions, and in 9 other such cities (likewise shown in Appendix F) Mutual's only access is subject to option-time provisions in favor of its competitors. For the most part, the cities and towns having only 1 full-time station rendering adequate coverage are smaller in population and are less important as markets, but they nevertheless include a fairly large number of important centres from which Mutual is completely barred.

[13] See footnote 10 above.

4. *The national advertiser's interest in access to markets.* The commercial use of networks of national scope (such as those of National, Columbia, and Mutual) for sponsored programs is by national advertisers, that is, concerns having or desiring markets for their products or services generally throughout all or most of the country, and therefore interested in having their programs heard by as large a portion of the public as is possible, consistently with the amount of money available to them for radio advertising and the probable return therefrom. This interest naturally centers first on the larger cities, which, because of concentrations of population not only within their corporate limits but also in their environs and in the trade areas tributary to them, generally provide the larger audiences per station and are vital to any national advertising campaign. The interest extends, however, to medium-sized and, progressively, to smaller cities and their respective trade areas, until a point is reached where the prospective audience may be too small, in proportion to the outlay and prospective [fol. 366] return, to attract the advertiser. It has been the experience of all networks (including Mutual), however, that as a sponsored program gains an audience in the larger markets and demonstrates its value to the advertiser, the advertiser seeks to extend the program to other and smaller markets, over a larger network of stations, and over a larger portion of the country. Thus, sponsored programs which at the outset were broadcast over comparatively few stations in the larger cities and in only a portion of the country's area have almost regularly been extended so as to be broadcast over a nation-wide network. In addition to the foregoing, there are national advertisers who, because of the location of their dealers, distributors, jobbers, sales organizations, or retail stores, or because of regional differences in habits and in demand for particular products or services, or because of the advertising campaigns of competitors, require access to certain but not all of the smaller markets in addition to the larger markets.

5. *The national advertiser's interest in continuity of his sponsored program.* Contracts between network organizations and advertisers (usually through advertising agencies) for the use of a network of stations for the broadcasting of a sponsored program are customarily for a period of 52 weeks, cancellable at the end of any 13 weeks' period.

It is the experience of all networks (including Mutual) that if use of the network has given satisfactory results and the advertiser's needs and desires with respect to continuous service and expansion are met, the great majority of such contracts are renewed from year to year for use of the same network on the same day, and at the same hour with the same, or an improved, character of program. A vital and usually determinative factor, however, in persuading an advertiser to enter such a contract with a particular network organization in the first instance, or to continue with and to renew such a contract thereafter, is the ability of the network organization to assure the advertiser of continued and uninterrupted regular broadcasting of his program over the stations which the advertiser has agreed to use, for the period of the contract and on the day and at the hour selected by the advertiser. The reasons for the importance of this factor include the following:

a) Most sponsored network programs entail large expenditures by the advertiser for talent and material used [fol. 367] in the production of such programs. This is made possible by the fact that, through the use of wire-line systems, the same program can be transmitted for simultaneous broadcasting to the audiences of many stations, and therefore to a much larger public, with a correspondingly greater return to the advertiser, without any increase in the cost of producing the program. The loss of audience resulting from unavailability of access to a desired market, or from discontinuance of the program by any station on the network in such a market, means a corresponding diminution in the return to the advertiser for his outlay.

b) Any sponsored network program requires a substantial period of time (usually not less than eight weeks and frequently longer) before it acquires a regular audience and a goodwill with the public served by a particular station of a character satisfactory to the advertiser, and, once it has acquired such an audience and goodwill (which, in the case of any good program, increases with the length of the period of time during which the program is broadcast), the advertiser has a considerable investment therein which is lost if the station becomes unavailable and the advertiser is deprived of access to the market.

c) When a new network commercial program is about to be broadcast, or is being broadcast, it is the practice

of the advertiser sponsoring the program to make large expenditures for promotional advertising in newspapers and other media to attract public attention to the program, and to take appropriate steps to inform his dealers, distributors, jobbers, sales organizations or retail stores in each community about the program and enlist their cooperation in promoting public interest therein by advertising and other means. The advertiser has a considerable investment resulting from such expenditures in each community, which is lost if the station in that community becomes unavailable and the advertiser is deprived of access to the market.

d) Most network commercial programs have a continuous and connected character, frequently having a nature and importance corresponding to that of instalments in a serial story, or of sequels. In addition, a vital feature of successful radio advertising is consistent repetition at regular and scheduled intervals, known to and expected by the [fol. 368] public. Much of the value of such programs to the advertiser is in preserving a regular audience for such programs against interruption or discontinuance thereof, and against shifts in the day and hour for which they are scheduled. Particular hours in the day are more important to the advertiser than other hours, either because (as in the case of certain evening hours, such as 8 p. m. to 10:30 p. m.) there is a greater potential audience, or because some hours are more appropriate for a given type of program than other hours. Ordinarily, the advertiser has, at the outset, selected the best hours available for his purposes. If, by reason of a station's becoming unavailable at the scheduled hour, the advertiser is compelled to shift his program to another hour on the same station, he suffers serious disadvantages and loss of return on his expenditures because (1) the audience built up for the scheduled hour is dislocated and is temporarily and, to some extent, permanently lost (not infrequently to a competitor), and a new audience must be built up, with corresponding expenditures for promotion; (2) the hour to which the program is shifted (sometimes to the next day) is usually less desirable with respect to potential audiences, or appropriateness for the program, or timeliness, and may, in turn, likewise be subject to further shifting and repetition of the same experience; (3) when such shifts occur, the broadcasting of the program

over the station involved must be done by transcription and, under the regulations of the Federal Communications Commission, must be announced as such, with a consequent and very real loss in the effectiveness of the program with the public as against a broadcasting of the program instantaneously at the time of performance by live talent; (4) the network commercial programs of one or more competitors of the advertiser may, and frequently are, being broadcast over other stations (or the same station) in the same market without being subject to these disadvantages.

6. *Factors necessary to assure equal competitive opportunity for national networks.* In order to have equal opportunity in securing commercial network programs from national advertisers, a national network organization must be able to offer, on a footing substantially equal to that of its competitors, (a) access to the markets desired by such advertisers, and (b) assurance of the continued broadcasting [fol. 369] of the advertisers' programs at the desired and scheduled time in such markets.[14] Inability in either respect necessarily results in a preference for, and a choice by, national advertisers of other national network organizations not thus handicapped, both in originally placing their business and in continuing business already placed, even though in all other respects such advertisers may prefer the handicapped organization on its merits. Many cities are of such importance (including a number of cities adequately served by less than four full-time stations, from access to which Mutual is either completely barred, or is barred on a continuous basis during the more desirable hours, by the restrictive contracts of National and Columbia, as shown in Appendix F) that the inability of one network and the ability of a competing network to afford access thereto on a continuous basis to a single such city will usually deter-

[14] As stated by Mr. Paley in his affidavit (pages 12-13):

"Nor will the advertiser embark upon the costly venture of a nationwide radio program series unless the relations between the network he selects and its affiliated stations are sufficiently stable so that he may reasonably expect to maintain his coverage and enjoy the cumulative fruits of his efforts to please the listening public and promote sales of his product."

mine the choice of the advertiser. Other cities (including a large number adequately served by less than four full-time stations, from which Mutual is either wholly or largely barred as aforesaid) are of sufficient importance so that, while such access to a single such city may not determine the advertiser's choice, access to two, three or a larger number of such cities, depending on their importance and their appeal to the particular advertiser, will determine his choice. The choice by an advertiser of one network over another for such reasons results in loss of revenue for the latter network and its affiliates not only with respect to the markets to which the losing network does not have such access but also with respect to all other markets in which it does have such access, as well as a loss of prestige with both advertisers and advertising agencies. The handling and placing of nearly all national network advertising is controlled by a limited number of agencies. The appraisal and judgment of these agencies of the respective abilities [fol. 370] of competing networks to afford the desired continuous access to markets is frequently a determining factor in the choice of networks and, by reason of their great interest and their continuous and competitive activities in the field, such agencies are intimately familiar with the facts and circumstances bearing on such access in connection with each network. In addition, there are several trade journals wholly or largely devoted to the broadcasting industry, including *Broadcasting*, *Variety* and *Radio Daily*, which circulate among all advertising agencies and, to a large extent, among national and prospective national advertisers, which trade journals regularly report, as items of news interest to their readers, the acquisition or loss of business by any national network organization, and frequently the reasons therefor, with corresponding enhancement or impairment of the prestige of the network involved, and with corresponding effect on its ability to retain existing business and to obtain further business.

7. *Competitive use of such factors by National and Columbia in representations to agencies and advertisers.* At all times since shortly after the organization of the Mutual network, and particularly since it became a nation-wide network, National and Columbia, in competing with Mutual for the business of national advertisers, have made, and have caused their salesmen, representatives, and agents to

make, representations to advertising agencies and advertisers that, because of their contracts with affiliates in markets adequately served by less than four full-time stations, needed or desired by the advertiser,

a) Mutual is unable to provide any access at all in certain of such markets, either at the outset or in case of expansion;

b) Mutual is unable to provide access on an assured continuous basis in a number of other of such markets during the more desirable hours, or the hours usually needed or desired by the advertiser;

c) Any such access as Mutual can obtain for a network commercial program in the class of markets last mentioned during the more desirable hours, or the hours usually needed or desired by the advertiser, will be subject to discontinuance or to shift on 28 days' notice at the demand of National or Columbia (as the case may be), with the at- [fol. 371] tendant inconveniences, resorts to transcripts and less favorable hours, loss of investment and audience, and other disadvantages heretofore pointed out.[15]

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[15] In certain instances, examples of which are pointed out below, this representation has been accompanied by specific threats on the part of National's Blue Network that all, or an important part, of the precise time desired by the advertiser on stations in such markets would be preempted by National under its option-time privileges for another specified advertiser who was ready and willing to use the time for a network commercial program over the Blue Network. The cities in which are located stations jointly affiliated with National or Columbia and Mutual, but in which Mutual's access is subject to the restrictive contract provisions in favor of National or Columbia, are as follows:

Cleveland, O.	Harrisburg, Pa.
Houston, Texas	Binghamton, N. Y.
Memphis, Tenn.	Evansville, Ind.
Birmingham, Ala.	Manchester, N. H.
Omaha, Neb.	Augusta, Ga.
Richmond, Va.	Cedar Rapids, Iowa
Jacksonville, Fla.	Lancaster, Pa.
Des Moines, Iowa	Corpus Christi, Texas

In all but 3 instances, the stations in question are affiliated with National.

d) Advertisers who have used the Mutual network in the past have been subjected to such handicaps and disadvantages and, as a result, have left the Mutual network and have placed their business with National Columbia.

Such representations have caused, and are continuing to cause, Mutual to lose the business of national advertisers who have placed their business with National and Columbia and who, as affiant is informed and believes, would otherwise have placed their business with Mutual. The situation has arisen much more frequently in Mutual's competition [fol. 372] with National's Blue Network, than with National's Red Network or Columbia because National has been able to sell only a comparatively small amount of the time it has had under option over its Blue Network affiliated stations and such stations consequently have a much larger amount of time available during their more desirable hours for the programs of another network, and a much greater need for revenue and a corresponding desire and interest in having such use made of their time, than is true of most of the Red Network and Columbia affiliated stations. As is hereinafter set forth in detail National has, usually in the interest of its Blue Network, from time to time actually exercised its option-time privileges under its contracts with affiliates in markets such as those which have been described so as to force advertisers who were theretofore using the Mutual network to take their business and their programs from Mutual and to place them with National, either because the advertisers were blocked from further desired expansion for their programs, or because they were completely denied access to markets needed or desired by them, or because of having to shift their programs to delayed broadcasts by transcription. The result has, on occasions, been simply that, with respect to such markets, the same advertiser with the same program would continue the use of the same sta-

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Salt Lake City, Utah	York, Pa.
Bridgeport, Conn.	Columbia, S. C.
Tulsa, Okla.	Bangor, Me.
Spokane, Wash.	Weslaco, Texas
Charlotte, N. C.	Shenandoah, Iowa

tions at the same hour, but to do so was forced in other markets to use National's Blue Network instead of the Mutual network. In addition to the representations above described, National, in order to induce advertisers to its Blue Network, (a) has given them the benefit of a system of large discounts made possible only by its very profitable operation of the Red Network, (b) has assured such advertisers that, if they will use the Blue Network, they will be given the benefit of the first opening of suitable time that develops on its Red Network, and (c) has given such advertisers the benefit of a combination of the better stations affiliated with both the Red and the Blue Networks, all of these being competitive advantages for National possible only because of its ownership and operation of two supposedly competing national networks.

8. *Representations with respect to effective date of the Commission's Regulations.* In addition to the representations summarized in the preceding paragraph, as affiant is informed and believes, National and Columbia are, and ever [fol. 373] since the Commission's Order of May 2, 1941, have been, making, and causing their salesmen, representatives and agents to make, representations to advertising agencies, to national advertisers, and to their affiliates, that, by reason of proceedings which they proposed to institute in court (including these pending proceedings), the Commission's Regulations would not go into effect in less than two or three years (if at all) and that during such period of time affiliates may safely enter into or renew contracts with National or Columbia containing provisions such as those forbidden by the Regulations, and national advertisers cannot place their business with Mutual without being subject to the hardships and inconveniences already described. As a result of such representations, coupled with the successful exercise by National of its option-time provisions within the past two months to its advantage and at the expense of Mutual, all as hereinafter more fully set forth, Mutual has lost business of vital importance to its continued success, and is immediately threatened with the loss of further such business, and, unless the Regulations are permitted to go into effect, affiant fears it will continue to lose such business to a point where its existence will be endangered.

9. *Current and past examples of loss of business by Mutual because of the restrictive contracts.* (a) *The Bal-*

lantine Program. In June, 1941, after extensive efforts and outlay, Mutual secured, and entered into, a contract with J. Walter Thompson Company, one of the leading advertising agencies, acting in behalf of its client, Ballantine & Sons, brewers of ale and beer, for the broadcasting of a network commercial program over 77 stations affiliated with Mutual at the scheduled hour 9:30 p. m. to 10 p. m. (New York City time) on Friday nights, for the usual period of 52 weeks, commencing in September, 1941, cancelable on four weeks' advance notice at the end of any 13-week cycle. The program which was proposed to be broadcast, and which was thereafter broadcast, was of outstanding audience appeal and was of a character and quality of excellence such as to contribute greatly to the prestige of Mutual and its affiliates, with a heavy cost of production for the advertiser and featuring popular and well-known artists and talent such as Charles Laughton, Milton Berle, Shirley Ross, and Bob Crosby's Orchestra.

Included among the 77 stations were 14 in cities adequately served by less than four full-time stations. All 14 [fol. 374] stations were (and are) affiliated with National under contracts containing network option-time clauses above described. The call letters, location and network affiliation (other than with Mutual) of these stations were and are as follows:

WHK	Cleveland	Blue Network
WTAG	Portland	Red "
WCSH	Worcester	Red "
WTIC	Hartford	Red "
WICC	Bridgeport	Blue "
WMFF	Plattsburg	Blue "
WGAL	Lancaster	Red and Blue Networks
WORK	York	Red and Blue "
WJHP	Jacksonville	Blue Network
WEAN	Providence	Blue "
WKBO	Harrisburg	Red and Blue "
WKAT	Miami	Blue Network
WLBZ	Bangor	Red and Blue "
WXYZ	Detroit	Blue Network

It was necessary for the 14 stations to accept the Ballantine program subject to the exercise by National of its privilege under the network option-time provisions to preempt the time on 28 days' notice.

On or about September 15, 1941, 10 of the 14 stations notified Mutual they could not continue to broadcast the Ballantine program after October 10, 1941, at the scheduled hour (namely, from 9:30 to 10:00 p. m. on Friday evenings) because that time was subject to option by National and National had exercised its option for the broadcasting of a program sponsored by the Canada Dry Company. The stations advised Mutual that on and after October 10, 1941 the program would have to be broadcast by them through the use of transcriptions at a later hour (meaning another day in most instances), which substitute time, to be satisfactory to the advertiser (that is, in equally desirable hours), would necessarily be at an hour likewise subject to preemption by National on exercise of its option privileges. National's action in exercising its option worked to the injury of the 10 affiliates in that not only did they have to accept a lower basis of compensation from National than from Mutual but the Canada Dry program was for 25 min- [fol. 375] utes instead of 30 minutes, thus further reducing their compensation.[16]

On October 23, 1941 Mutual was notified in writing by J. Walter Thompson Company that the agency was canceling the Ballantine program effective after the broadcast on October 31, 1941. A copy of this letter and enclosure is attached hereto as Appendix G. Since the contract was binding for a 13-week period ending December 5, 1941, the agency offered to compensate Mutual for time from October 31, 1941 to December 5, 1941, without making use of the Mutual network if Mutual would not release the agency from its obligation. The amount thus to be paid to Mutual was $27,711.75 for the five weeks involved, plus an additional $17,984.20, because of the inapplicability of the short rate, resulting from broadcasting only eight weeks instead of 52 weeks. This amount constituted approximately 16 per cent of the total amount that Ballantine would have been called upon to pay to Mutual under its contract for the 52-week period, and, in the absence of any rate concession

[16] Affiant is informed and believes that the primary reason the Canada Dry Company scheduled its program with National rather than with Mutual was that Mutual could not assure continuous access to the markets served by these 14 stations at an hour acceptable to the advertiser, whereas National was in a position to do so.

made by National to the agency or the advertiser, is indicative of the value placed by them upon the continued and assured access which National was able to provide to the markets in question.

Prior to soliciting and procuring the Ballantine account, National had not accepted any beer or liquor advertising over either its Red or Blue Networks for several years, and had allowed it to be understood that it was its regular policy not to accept such advertising. To secure the Ballantine program, therefore, and to deprive Mutual thereof, National introduced a major change in its policy, at least for the Blue Network. On information and belief, affiant further states that, as an additional inducement to the advertising agency, National informed it that if Ballantine would make use of the Blue Network it would have the privilege of transferring to the Red Network as soon as time thereon should [fol. 376] become available and National should decide to accept such advertising on the Red Network.

On October 27, 1941, Mutual was advised by J. Walter Thompson Company, both orally and by letter, that the Ballantine program would continue over Mutual for the remainder of the 13-week period, thus rescinding the cancellation as of October 31, but canceling the program as of December 5, 1941. A copy of the letter and enclosure, both dated October 27, 1941, is attached hereto as Appendix II. Since that date the program has been discontinued on the Mutual network and has been broadcast over National's Blue Network. Mutual's loss of the program has entailed not only loss to it and to its affiliates of the very substantial revenue involved for the remainder of the original contract period and any renewals thereof which the agency and the advertiser might otherwise have agreed to, but also the loss of a very important and popular program and of the audience resulting therefrom, as well as a corresponding loss of prestige among advertising agencies, advertisers, and actual or prospective affiliates. To illustrate the wide publicity attendant upon such an occurrence, affiant refers to news items appearing in the trade magazine *Broadcasting* for October 27, 1941, at page 50, and in the trade magazine *Variety* for October 29, 1941, at pages 31 and 38, copies of which are set forth in Appendix I.

(b) *The March of Time Program.* In June, 1941, Mutual entered upon negotiations with Time, Inc., publishers of

Time Magazine, for the broadcasting over the Mutual network of a program known as "March of Time". This program had been formerly on the Columbia network, but had not been broadcast for some two years. Mutual was given to understand by the representatives of Time, Inc., that during the coming year the Mutual network would be used for the purpose. Thereupon, as affiant is informed and believes, officials of National proceeded directly to the representatives of Time, Inc., and told the latter, in substance, that if Time, Inc., placed its program on Mutual, National, through the exercise of its option privilege to preempt broadcasting time of affiliate stations, would see to it that the "March of Time" program would be either eliminated from stations in a number of important markets or, in the alternative, forced to delayed broadcasts by transcription. More specifically, as affiant is informed and believes, National's said officials represented that National had an order [fol. 377] from a concern known as the Clark Candy Company which could be applied to the precise half-hour in question (8.00 p. m. to 8:30 p. m. on Thursday nights) and that, after "March of Time" went to Mutual, the Clark Candy program would be used for the purpose of such elimination, but if the "March of Time" program would use National's Blue Network the Clark Candy program would be moved to, and scheduled on, the half-hour immediately following. As the result of said representations by National officials, Time, Inc., purchased time on the Blue Network of National and has been using said network since early in October, 1941, and the Clark Candy program has been scheduled for the half-hour immediately following. National's scheduling of the program for Time, Inc., represented a distinct change in its theretofore publicly announced policy against dramatization of war scenes and impersonations of world figures, as well as its policy against the use of recordings on network programs. In illustration of the publicity attendant upon the change of policy, affiant refers to a reprint from the trade magazine *Broadcasting*, October 13, 1941, page 66, a copy of which is attached hereto as Appendix J.

(c) *The Lucky Strike Program.* Approximately three years ago, Mutual secured the American Tobacco Company as sponsor for a regular weekly program advertising its product, Lucky Strike Cigarettes. The program was Kay

Kyser's "College of Musical Knowledge," and had been previously broadcast over the Mutual network as a sustaining program. Because of the popularity of the program and its satisfactory return to the advertiser after a period of about 13 weeks, the advertiser desired to expand the program to reach additional markets but, because of the restrictive contracts of National and Columbia, Mutual was unable to meet the advertiser's needs. The advertiser thereupon discontinued use of Mutual and placed the program on National, over which it is still being broadcast under the same name and with the same general character. For the same reason, the advertiser transferred a program "Melody Puzzles" from Mutual to National's Blue.

(d) *The "True or False" Program.* Shortly after Mutual's experience with the Lucky Strike program, Mutual secured the J. B. Williams Company as sponsor for a regular weekly program known as "True or False," at first [fol. 378] broadcast over a few stations and gradually expanding to more stations, including several also affiliated with National's Blue Network under restrictive contracts. National thereafter exercised its option-time privileges to force such stations to broadcast another network commercial program in the time required for "True or False" and, as a result of the hardships and inconveniences caused thereby, the advertiser discontinued the program on Mutual and transferred it to National's Blue Network, over which network the program has ever since been, and is still being broadcast, on the same evening (Monday) every week.

(e) *The "Don't You Believe It" Program.* In 1939, because of the exploitation by National of said restrictive contract provisions to prevent expansion of the program to other stations and to force stations already broadcasting the program to discontinue or shift it to a delayed broadcast by transcription, Mutual lost the program "Don't You Believe It," sponsored by P. Lorillard & Sons, to National's Blue Network.

(f) *The "Famous Jury Trials" Program.* In 1938-1939, because of the exploitation by National of said restrictive contract provisions to force stations already broadcasting the program to discontinue or shift it, Mutual lost the program "Famous Jury Trials," sponsored by Mennen's. The sponsor went to a combination of Blue and Red stations.

(g) *The Phillip Morris Program.* In 1939, because of Mutual's inability to provide expansion into additional markets on an assured continuous basis because of National's restrictive contracts, Mutual lost a program sponsored by Phillip Morris & Company, and theretofore broadcast over the Mutual network, to National's Blue Network.

(h) *The "Goodwill Hour" Program.* Early in 1940, because of the exploitation by National of its restrictive contract provisions to force stations to discontinue or shift the program, Mutual lost the program "Goodwill Hour," previously broadcast over its network, to National's Blue Network, over which network the same program is still being broadcast regularly on Sunday evenings.

(i) *General.* The foregoing, while including the principal examples of network commercial programs known by affiant to have been lost by Mutual because of National and Colum- [fol. 379] bia's said restrictive contract provisions, is by no means a complete list. Throughout its existence, Mutual has regularly competed with National and Columbia for each new or prospective national advertiser, as far as known to it, and in the course of this competition a number of such advertisers have placed their business with National or Columbia under circumstances which, so far as known to affiant, indicate that factors based on the restrictive contract provisions either were determinative or contributed substantially to the result.

10. *Apprehended loss of further business by Mutual.* (a) *The Coco-Cola Company Program.* In September, 1941, Mutual entered into a contract with the D'Arcy Advertising Agency, acting in behalf of its client, Coco-Cola Company, for the broadcasting of a commercial network program over 118 stations affiliated with Mutual five nights a week from 10:15 to 10:30 p. m., and the sixth night from 10:15 to 10:45 p. m. This contract was secured after long and arduous negotiations in competition with National and Columbia, during which National sought to persuade the agency to use National's Blue Network on the representation that if Mutual were used the program would either be eliminated from certain stations or forced to a delayed broadcast by transcription at a less desirable hour. Nevertheless, for reasons having to do with the merits of the respective networks, Mutual was able to persuade the agency

and the client to contract with Mutual. Mutual, furthermore, called the attention of the agency and the client to the Commission's Order of May 2, 1941 and the accompanying regulations in answer to the representations made by National, and it is affiant's information and belief that, if it had not been for its so doing, the account would have gone to National. This account is the largest piece of business Mutual has had in its history and, so far as is known to affiant, it is the largest piece of business advertising a single product by any network. It represents over $2,250,000 gross billing annually. The program was scheduled to, and did, start November 3, 1941.

As soon as the fact became known that Mutual had secured the contract, National made redoubled efforts to deprive Mutual thereof through exploitation of its option-time contract provisions. Within 48 hours after Mutual had notified its affiliated stations of the Coco-Cola order, [Tr. 380] National, which had previously been competing for the same program at the same or other hours, entered into contracts with one of the leading and best known advertising agencies for the broadcasting of two nationwide network commercial programs on Monday and Wednesday evenings from 10 p. m. to 10:30 p. m. for a large national advertiser, a manufacturer of drugs. Upon information and belief, affiant states that these specific hours were chosen primarily, if not entirely, to enable National to interfere with the broadcasting of Mutual's Coco-Cola program by stations having contracts with National. In any event, the result was that, on or about October 1, 1941, and thereafter, such stations were notified by National that National was exercising its option with respect to the two said half-hours beginning October 20 for two programs, the character of which said stations apparently had no knowledge. Because of such notifications from National, several such stations have been compelled to reject the Coco-Cola program, including stations at Tulsa, Okla., Birmingham, Ala., Houston, Tex., and Spokane, Wash. A number of other stations, however, similarly under contract with National, such as stations at Providence, R. I., Bridgeport, Conn., Richmond, Va., Cleveland, O., Charlotte, N. Car., Memphis, Tenn., Jacksonville, Fla., Ogden, Utah, and Des Moines, Ia., relying upon the Commission's regulations of May 2, 1941, as revised October 11, 1941, have declined to accede to Na-

tional's demands. Due to the number and importance of such cities, together with the other cities on the Mutual network, the advertiser has not left Mutual. Affiant believes and states the fact to be that, if the effective date of the regulations is postponed for any substantial period of time and National is permitted to compel these stations to adhere to their existing contracts, Mutual will lose this account. The client is unwilling, and has expressly stated its unwillingness, to take any station which does not broadcast the program all six evenings of the week on a live basis at the time scheduled (rather than by transcription), as otherwise the effectiveness of the particular advertising campaign of the client would be greatly impaired.

To illustrate the extremely unfavorable publicity which has already attended National's efforts to deprive Mutual of this program, affiant refers to articles appearing in *Variety*, October 8, 1941, at page 24, and *Broadcasting*, October 13, 1941, at page 14, copies of which appear in Appendix K.

[fol. 381] (b) *The Bayuk Cigar Company Program.* The Ivey and Ellington Agency, in behalf of its client, the Bayuk Cigar Company, has been a regular user of the Mutual network, purchasing initially three one-quarter hours and now using five one-quarter hours a week. In all of the important markets where there are only three stations, the advertiser has been compelled to accept delayed broadcasts by transcription. Within the last two months the advertiser has notified Mutual of its intention to discontinue the use of the Mutual network and to purchase the Columbia network because of the large number of delayed broadcasts by transcription to which the advertiser has been subjected over the Mutual network (due to National having exercised its privilege under option-time contracts and having placed other network commercial programs in the time used by the advertiser over such stations. The advertiser contemplated adding another broadcast period a week to its schedule. It was unwilling to accept any delayed broadcasts by transcription and insisted upon assured time as scheduled. In view of the Commission's action of October 11, 1941 and relying thereon, Mutual assured the advertiser that, if it would purchase 8:00 to 8:15 on Friday night, which was currently unused by National's Blue Network on its affiliate stations, Mutual would be able to provide Bayuk with uninterrupted broadcasting at the scheduled time. As a

result, the advertiser has renewed its contract and has added the additional one-quarter hour. If the option-time privilege is successfully exercised by NBC on any of these stations, the advertiser will definitely exercise its right of cancellation with the Mutual network, and Mutual and its affiliates will lose the program.

(c) *General.* The loss of the Cocoa-Cola and the Bayuk Cigar Company programs, or either of them, would greatly and irreparably injure Mutual and its affiliates from the point of view of both revenue and prestige. Mutual has, at present, a total of 14¼ hours a week sold for network commercial programs over stations under contract with National or Columbia, within periods of time embraced by option-time provisions in those contracts, in markets regarded as essential by advertisers. As long as the restrictive contracts are permitted to be maintained in force, Mutual is subject to the continuous hazard of losing all or [fol. 382] any portion of these programs. The figure constitutes a very considerable portion of Mutual's total of network commercial programs and the loss of all or any very large portion of the 14¼ hours a week would be fatal to Mutual's continued existence as a national network. Furthermore, until the Commission's Regulations go into effect, Mutual will be virtually unable to sell any more time for commercial network programs during the more desirable hours, namely, those covered by National's option-time provisions. Representatives of three of the largest advertising agencies in the country, handling a very large and important volume of national advertising, have expressly stated to Mutual that they will not purchase time over Mutual for any client of theirs in such hours unless and until Mutual can give assurance with respect to continued clearance of the scheduled time equal to that which National or Columbia is able to give.

11. *Effect on Mutual's ability to secure and retain desirable affiliates.* Loss of business and the consequent loss of prestige such as Mutual has already suffered because of the restrictive contract provisions and such as is threatened if those provisions are kept in force, has a serious adverse effect on Mutual's ability to secure and retain affiliate stations located in important markets and necessary to its successful operation as a national network. Under contracts between Mutual and its affiliates, the affiliates di-

rectly or indirectly bear the expenses of wire-lines necessary to link their stations with the Mutual network and, if the revenue received by an affiliate from Mutual drops below this expense (as is already the case in a number of instances), the affiliate tends to, and will, if the drop is substantial, terminate his affiliation with Mutual and thus deprive Mutual of an outlet in the market served by his station. In certain other instances where the affiliate's station has, for example, better coverage or a larger audience than the station affiliated with National's Blue Network serving the same market, Mutual will be unable to retain the affiliate as against the Blue Network and will be forced to accept a less desirable affiliate. Generally, the national network organization which is able, through volume of business or otherwise, to provide the larger revenue (subject to the qualification that it also provides the affiliate with a good continuous program service, commercial and sustaining), is [fol. 383] able to secure the station with the better coverage and the larger audience in any community, and to force the station to accept the maximum of whatever restrictions by way of exclusive option-time are permitted. Mutual, because of its smaller volume of business, is already under a heavy handicap in this respect, in competing for affiliates with either National's Red Network or Columbia's network, and is under somewhat of a handicap in competing for affiliates with National's Blue Network. Further loss of revenue will irreparably injure Mutual in this respect.

VI

Lack of Injury to National and Columbia Through Immediate Enforcement of Regulations

1. *Discussion limited to certain Regulations.* Affiant's discussion will be confined primarily to Regulations 3.101, 3.103, and 3.104, having to do respectively with network exclusivity, length of contract, and option-time. By their language, and the provision made by the Commission for such extensions of time as may be necessary, Regulation 3.106, having to do with network ownership of stations, and Regulation 3.107, having to do with the operation of two supposedly competing networks by one organization, do not appear to have or threaten any immediate effect on either National or Columbia. Columbia's complaint does not seek

relief against either of said Regulations or Regulation 3.108. Throughout its existence and without difficulty, Mutual has operated in conformity with Regulations 3.105 and 3.108, having to do with the affiliate's right to reject network programs and to fix its own rates on non-network commercial programs. Regulation 3.102, having to do with station exclusivity, obviously cannot operate to the injury of a network, but is of importance in a consideration of the effects of Regulations 3.101 and 3.104 and will be discussed incidentally in connection therewith.

2. *No adverse effect in cities adequately served by four or more full-time stations.* Apart from, and in addition to, the facts and circumstances recited in later paragraphs under this heading, Regulations 3.101 and 3.104, forbidding network exclusivity and restricting the use of option-time, cannot have any appreciable adverse effect on either National or Columbia in any city adequately served by four or more [fol. 384] full-time stations. In each such city, each of the four national networks (National's Red, National's Blue, Columbia, and Mutual) already has its regular full-time affiliate, and there will be no occasion or tendency on the part of any one of these networks to attempt to make use of a station affiliated with any of the others. It is very important to any network that, so far as possible in any city, it have a regular affiliate, (a) known and advertised to the public as such, available not only for its network commercial but also its network sustaining programs, (b) interested in promoting the network and securing business and goodwill for it, and (c) in a position to cooperate with the network in providing programs or facilities for securing programs originating in that locality. The network organization will willingly and regularly accept a station with smaller coverage as its regular affiliate in preference to sharing the time of a station with greater coverage with another network, and will willingly and regularly contract to give such station first call on its programs as permitted by Regulation 3.102. That a form of contract complying with the Regulations and at the same time preserving this right of first call in a manner satisfactory both to networks and to affiliates, can easily be worked out and formulated, has already been demonstrated by Mutual in the contracts which it has drafted for this purpose, hereinbefore described. Each network having given first call on its programs to its

respective affiliates, clearly there can be no such effects in such cities resulting from the operation of Regulations 3.101 and 3.104 as are stated or implied in the affidavits of Mr. Trammell and Mr. Paley. The unlikelihood of any complication arising from an attempt to create an "advertising super-network", is separately discussed below.

3. *No adverse effect with respect to time already in use for network commercial programs.* Nothing in the Commission's Regulations prevents, or interferes with, the carrying out by each network organization of any and all contracts with advertising agencies and advertisers for the use of any and all time now being used, or contracted to be used, over affiliated stations, for network commercial programs. This is true regardless of the amount or proportion of any station's time now subject to such contracts, regardless of the length of the period of time covered thereby, and regardless of the number of stations rendering adequate [fol. 385] service to a given city. Since virtually all such contracts are for a period of 52 weeks, and since ordinarily they expire in the early fall, the network commercial programs currently being broadcast thereunder over the National and Columbia networks will not, in the overwhelming majority of instances, be subject to disturbance or displacement in favor of the programs of another network or in favor of any non-network program earlier than the fall of 1942. Even then, due to the likelihood that the advertiser will desire to renew his contract for a further period of 52 weeks, due to the great interest, both financial and by way of prestige, which he, the affiliate, and the network have in such renewal, and due to the fact that, by reason of his continued use of such time, it will be clear for such purpose, the overwhelming probability is that it will be renewed over the same network and the same affiliate stations. In other words, neither the prohibition against network exclusivity nor the restrictions on option-time can have any adverse effect on time now already used over any station for National or Columbia network commercial programs. By the same token, but due to the Regulations becoming effective, time now actually in use over any station for Mutual programs cannot, during the period of the contract with the advertiser, be preempted for a new commercial program offered by another network.

4. *No adverse effect from limitation of option time to three hours per segment.* Passing over, for the moment, the requirement of Regulation 3.104 that option time provisions must henceforth be non-exclusive as between networks, affiant points out that, in the light of the undisputed facts, no adverse effect can result to National or Columbia from the limitation of network option-time to three hours per segment. Affiant states that, in the light of his experience, the Commission's division of the day into four segments (8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m and 11 p. m. to 8 a. m.) corresponds as nearly as is practicable, without undue complications of detail and with due regard for differences in time zones across the country, to the recognized and generally accepted listening habits of the public, the evaluation of the hours of the day as to relative desirability from the point of view of advertisers and the various classes thereof, and the needs for time on the part of non-network advertisers, for sustaining pro- [fol. 386] grams, and for purposes of programs of a local and regional character. The reservation by the Commission of anything over three hours in each segment free from network option corresponds very closely with actual practice in the case of those networks having the largest volume of network commercial programs, namely, National's Red Network and Columbia, and their affiliate stations. While in a few segments per week, one or the other of these networks may have slightly over three hours in actual use on some evenings on some (but by no means all) of their affiliate stations, the average actual use is substantially less than three hours per segment, and in those few instances where it is not, nothing in the Commission's Regulations prevents the continuance of such use under existing contracts with advertisers, or, with the consent of the stations invcived, the renewal of such contracts.[17]

5. *No adverse effect from prohibition of option-time exclusive against other networks.* As affiant has already

[17] In the morning segment, from 8 a. m. to 1 p. m., National, under its existing contracts on both its Red and Blue Networks, has an option only on two hours (from 10 a. m. to noon), and in the afternoon segment, from 1 p. m. to 6 p. m., only three hours (from 3 p. m. to 6 p. m.). Its evening option is 3½ hours (7 p. m. to 7:30 p. m. and 8 p. m. to 11 p. m.). It has no option on time between 11 p. m. and 8 a. m.

shown, in cities adequately served by four or more full-time stations, the restrictions imposed by Regulation 3.104 (as well as Regulation 3.101) cannot, as a practical matter, have any adverse effect on either National or Columbia. Affiant will now show that, so far as any legitimate purpose of option-time is concerned, the same is true in cities adequately served by less than four full-time stations.

Because of the inherent characteristics of network broadcasting, including virtually instantaneous transmission over wire-lines to all parts of the country and simultaneous broadcasting by many stations of the same program, it is highly important, as a business convenience, that obstacles to the necessary clearance over the desired stations be eliminated so far as practicable. These obstacles, however, consist primarily in the scheduling by individual stations of *non-network programs* (local or national spot) at [fol. 387] various hours, and, in the absence of provision for clearance of time against such programs, make it necessary for the network to consult, and in some instances, negotiate, for clearance of the time desired for a particular network commercial program. Such obstacles are not insuperable, as has been demonstrated by the operation of the Mutual network without option-time from its establishment in the fall of 1934 until early in 1940, and even since then with respect to a large number of its affiliates, as well as by the operation of National's networks without option-time to any substantial degree until after 1935. Regulation 3.104, however, permits option-time affording adequate and entirely sufficient clearance for three hours per segment against all such obstacles.[18]

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[18] Mr. Trammell's statement in his affidavit (page 20) is, in the light of the facts above stated, completely without foundation:

"Consequently, if optional time is prohibited, each and every advertising contract negotiated for such hours on the Red network would require negotiation by NBC with a minimum of 44 stations. In the normal course of its business, each of these stations would, under the Commission's amended Order, be scheduling the programs of other networks. Despite these conflicting demands, therefore, NBC would have to obtain the unanimous consent of not less than 44 persons, firms and corporations for each program scheduled."

By reason of their large existing use of the more desirable hours in each segment, the fact that existing contracts with advertisers are not disturbed by the Regulations, and the fact that each affiliate will desire to, and will, obtain first call upon the programs of any network with which it is affiliated, neither National's Red Network nor Columbia can possibly suffer any appreciable adverse effect from the restriction under discussion. Their respective affiliates in cities having less than four full-time stations will desire to remain their affiliates and to have first call on their programs. The case is somewhat different with National's Blue Network which, by reason of its smaller volume of business, is actually making use of only part of the time of its affiliate stations which National has under option. It will be adversely affected in that in cities served by less [fol. 388] than four full-time stations, with respect to those hours which it now has under option but has not been able to sell to any advertiser, it will (if the Regulation goes into effect) henceforth be deprived of its power to prevent its affiliates in such cities, at their discretion, from accepting and assuring the continuous broadcasting at the scheduled hour of network commercial programs provided by another network. In other words, National will, with respect to its Blue Network, be unable to exploit network option-time as a device to prevent or eliminate competition by another network, as distinguished from the legitimate purpose of option-time to provide simultaneous clearance over a number of stations as against non-network programs.

The prohibition against exclusive options will neither introduce nor lead to any appreciable confusion, difficulty in clearance, or necessity for negotiating with a number of stations as a prerequisite to entering into a contract with an advertiser. Each national network organization knows, and continuously maintains up-to-date information on, the use made by each of its affiliates of all time likely to be in demand for network commercial programs, and, in the case of cities adequately served by less than four full-time stations in which its affiliate may be serving also as the affiliate for another network, knows, and continuously maintains up-to-date information on, all time used over the station by the other network. Prospective national advertisers desiring new network commercial programs, or programs in addition to those already being broadcast, are not numerous and usually appear or become available singly and at the

rate of only a very few per year. In all but a tiny fraction of cases, all four national network organizations know of each prospect and actively compete for his business. Since most of the more desirable hours, particularly in the evening, are already in use over National's Red Network and Columbia, in most instances the competition is reduced to being between National's Blue Network and Mutual, each of which endeavors to provide the advertiser with access to the markets desired by him and in so doing offers access to the *same* stations in many cities (already enumerated) adequately served by less than four full-time stations. Once the time in question over these stations is sold to the advertiser by one of these networks, it is, of course, unavailable over these same stations to the other network for the period of the contract with the advertiser (in the absence [fol. 389] of exclusive option-time provisions in favor of the other network, such as are now exploited by National), but this is no more a disadvantage to one network than to the other, and is no more an injury to one advertiser than another, and cannot rightly be considered an injury to anyone, much less to broadcasting as an advertising medium. If it be deemed an injury to one network, it is relatively slight and is more than counterbalanced by the benefit to the affiliated stations and their audiences, and by the benefits resulting from active and fair competition on the merits of the competitors.

6. *No adverse effect from limitation of call period to 56 days.* So far as affiant knows, in all existing contracts of National and Columbia, the options may be exercised on not less than 28 days' notice. The increase in this call period to 56 days will not, in affiant's opinion, have any appreciable effect, adverse or otherwise. The time required for arranging the details of producing the program and the fact that in most instances a program to be broadcast during a given year, usually beginning in the fall, is actually contracted for more than 56 days in advance of its commencement or its renewal, will make adjustment to the new requirement a very simple matter involving no real inconvenience. Nothing in Regulation 3.104 prevents a station from accepting a network commercial program offered it on less than 56 days' notice.

7. *The apprehended "advertising super-network."* Of the various chimæric alarms which have been conjured up

to incite opposition to the Commission's Regulations, the apprehended "advertising super-network" is the most fantastic. Among the obstacles which eliminate this as a practical possibility are

a) the tremendous and uneconomic expense of leasing the necessary wire-lines (including the greatly increased proportionate expense involved in leasing wire-lines for short periods weekly), and the difficulty of securing such lines reaching many important and indispensable markets.

b) the fact that such a network, in order to hold its affiliates and justify its continued existence, would have to provide a sustaining program service for its affiliates, with attendant expenses in studio, equipment, staff, engineering, [fol. 390] promotion and publicity, all at a disproportionate cost,

c) the fact that on almost all the stations that would be necessary to constitute such a network, virtually all their desirable hours are now in actual use either for network commercial programs, or for non-network commercial programs (local or national spot), providing a greater revenue than could possibly be provided by the "super-network" advertisers,

d) the unwillingness of the owners of stations such as would be necessary to constitute such a network, to deal or affiliate themselves with any transient or fly-by-night venture, or any venture having an adverse effect upon the stations' total revenue.

The fact that no attempt has been made in the past to set up such a network, either in the period prior to 1935 when National had no exclusivity provisions and only inconsiderable option-time provisions in its contracts, or since 1935 during hours not subject to option or, if subject, not actually used, demonstrates that it is not a reasonable possibility. To add to the unlikelihood that the possibility has any practical significance, affiant points to the fact that the 64-station hook-up suggested for such a purpose in Exhibit I attached to Mr. Trammell's affidavit, includes, as nearly as affiant can calculate, 44 stations which are now affiliated with National's Red Network, 15 stations which are now affiliated with Columbia, and 5 stations which are now affiliated with National's Blue Network. In other words, even in the present state of affairs, National's Red Net-

work comes very close to being the apprehended "super-network", and, if present tendencies are permitted to continue under the restrictive contracts, National's Red Network and Columbia will actually constitute such network, to the disadvantage and eventual exclusion of all effective competitors.

8. *Apprehended diversion of advertising to other media.* The apprehension asserted in behalf of National and Columbia that the Regulations will result in diversion of advertising from radio to other media, is without foundation. As already pointed out, so far as clearance of time over affiliate stations serves any legitimate need or convenience, it is permitted by the Regulations, and the advertiser, once [fol. 391] having contracted through a network for a given period of time over a specified list of stations, will be assured (to a much greater extent than at present in the case of Mutual and to the same extent as at present in the case of National and Columbia) of continued use of the time for the period of his contract. The effectiveness of radio as a medium to reach the public cannot possibly be impaired, and should be enhanced, by enforcing the Regulations.

9. *Apprehended elimination or impairment of sustaining program service.* The charge that enforcement of the Regulations will result in elimination or impairment of sustaining program service by the networks is directly contrary to fact. To be successful in competition with other networks, each network must offer its affiliates, and through them the public, a continuous sustaining program service of excellent character and embracing varied features. The shortcomings of any one network in this respect will inevitably be reflected in loss of audience and public favor, in loss of the better affiliates in each city, and in eventual loss of the patronage of advertisers, to the advantage of such network's competitors.

10. *No adverse effect from two-year limitation on length of contracts.* Affiant is unable to perceive or anticipate any adverse effect on any network from Regulation 3.103, placing a two-year limitation on the contracts between networks and affiliates, as distinguished from the five-year term now prevailing *except* that, in the course of competition between networks for affiliates, a shorter term may eventually conduce toward bringing about more frequent adjustments of the rate of compensation paid by the network to the sta-

tion so as to provide the station with a more nearly fair and adequate share of the profits of network broadcasting. This, however, will be a slow process in any event and will not be particularly marked or substantial during the next two years.[19]

11. *General:* Over and above what affiant has already stated, affiant repeats and emphasizes the fact that, for the [fol. 392] usual business year in broadcasting, from September to September, virtually all business that is likely to be placed on national networks has already been placed (except for occurrences such as have already been pointed out, consisting of National's practices under its contracts and their effect on Mutual's programs). Except in the case of Mutual, where the effect is salutary, the Regulations have, and can have, no effect on existing network business for the duration of current contracts with advertisers (therefore, until September, 1942). Assertions such as are made by Mr. Trammell in his affidavit (pages 19, 21) or by Mr. Paley in his affidavit (pages 34-35) that the Regulations, either taken together or separately, will "destroy the present structure of network broadcasting" are absurd in view of the known and undisputed facts.

Fred Weber.

Subscribed and sworn to before me this 11th day of December, 1941. ——, Notary Public. —— County, N. Y. Co. Clk's No. —, Reg No. —. Term expires —— —, 194—. (Seal.)

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[19] In this connection it should be noted, with reference to two of the affidavits filed by National, the contract of WOW, Omaha, with National expired December 2, 1941, and the contract of WHAM, Rochester, with National will expire February 1, 1942.

APPENDIX A

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
WOR	New York, N. Y.	11,690,520		50,000	50,000	710	Unlimited
WGN	Chicago, Ill.	4,499,126		50,000	50,000	720	"
WIP	Philadelphia, Pa.	2,898,644		5,000	5,000	610	"
CKLW	Detroit—Windsor, Mich.	2,295,867		5,000	5,000	800	"
WLOL	Minneapolis-St. Paul, Minn.	911,077		1,000	1,000	1,330	"
WHK	Cleveland, Ohio	1,214,943	N.B.C. Blue	5,000	5,000	1,420	"
WCLE	Cleveland, Ohio	1,214,943		500	.....	610	Daytime
WOL	Washington, D. C.	907,816		1,000	1,000	1,260	Unlimited
WFBR	Baltimore, Md.	1,046,692		5,000	5,000	1,300	"
KWK	St. Louis, Mo.	1,367,977		5,000	5,000*	1,380	"
WCAE	Pittsburgh, Pa.	1,994,060		5,000	5,000	1,250	"
WGR	Buffalo-Niagara, N. Y.	857,719		5,000	1,000	550	"
WKRC	Cincinnati, Ohio	789,309		5,000	1,000	550	"
KITE	Kansas City, Mo.-Kans.	634,093		1,000	1,000	1,590	"
WHB	Kansas City, Mo.-Kans.	634,093		1,000	.....	880	Daytime
WIBC	Indianapolis, Ind.	455,357		5,000	1,000	1,070	Unlimited
KFEL	Denver, Colo.	384,372		5,000	5,000	950	"
WSAY	Rochester, N. Y.	411,970		250	250	1,240	"
WHKC	Columbus, Ohio	365,796		500	.....	640	L-KFI
WAGE	Syracuse, N. Y.	258,352		1,000	1,000	620	Unlimited
WHBF	Rock Island-Davenport-Moline, Ill.-Ia.	174,995		5,000	5,000	1,270	"
KFOR	Lincoln, Neb.	88,191		250*	250	1,240	"

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APPENDIX A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
			COLONIAL STATIONS				
WAAB	Boston, Mass.	2,350,514		1,000	1,000	1,440	Unlimited
WEAN	Providence, R. I.	711,500	N.B.C. Blue	5,000	5,000*	790	"
WFCI	Pawtucket, R. I. Providence, R. I.	711,500		1,000	1,000	1,420	"
WTHT	Hartford, Conn. New Britain, Conn.	502,193		250	250	1,230	"
WELI	New Haven, Conn.	308,228		1,000	500	960	"
WSPR	Holyoke-Springfield, Mass.	394,623		500	500	1,270	"
WICC	Bridgeport, Conn.	216,621	N.B.C. Blue	1,000	500	600	"
WATR	Waterbury, Conn.	144,822		1,000*	1,000*	1,320	"
WNBH	Fall River-New Bedford, Mass.	272,648		250	250	1,340	"
WSAR	Fall River-New Bedford, Mass.	272,648		1,000	1,000	1,480	"
WLLH	Haverhill-Lowell-Lawrence, Mass.	334,969		250	250	1,400	"
WBRK	Pittsfield, Mass.	49,684		250	250	1,340	"
WCOU	Lewiston, Me.	38,598		250	250	1,240	"
WNLC	New London, Conn.	30,456		250	250	1,490	"
WSYB	Rutland, Vt.	17,082		1,000*	1,000*	1,380*	"
WHAI	Greenfield, Mass.	15,672		250	250	1,240	"
WLNH	Laconia, N. H.	13,484		250	250	1,340	"

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DON LEE

KHJ	Los Angeles, Cal.	2,904,596		5,000	5,000*	930	Unlimited
KFRC	San Francisco-Oakland, Cal.	1,428,525		5,000	5,000	610	"
KOL	Seattle, Wash.	452,639		5,000	5,000*	1,300	"
KALE	Portland, Ore.	406,406		5,000	5,000	1,330	"
KGB	San Diego, Cal.	256,368		1,000	1,000	1,360	"
KGA	Spokane, Wash.	141,370	N.B.C. Blue	10,000*	10,000*	1,510	"
KMO	Tacoma, Wash.	156,018		5,000	5,000	1,360	"
KTKC	Visalia-Fresno, Cal.	97,504		5,000*	5,000*	940*	"
KPMC	Bakersfield, Cal.	29,252		1,000	1,000	1,600	"
KFXM	San Bernardino, Cal.	43,646		250	250	1,240	S-KPPC
KDB	Santa Barbara, Cal.	34,958		250	250	1,490	Unlimited
KIT	Yakima, Wash.	27,221		1,000	1,000	1,280	"
KVOE	Santa Ana, Cal.	31,921		250	250	1,490	"
KRKO	Everett, Wash.	30,224		250	100	1,400	"
KORE	Eugene, Ore.	20,838		250	250	1,450	"
KFJI	Klamath Falls, Ore.	16,497		100	100	1,240	"
KXRO	Aberdeen, Wash.	18,846		250	250	1,340	"
KIEM	Eureka, Cal.	17,055		1,000	500	1,480	"
KGY	Olympia, Wash.	13,254		100	100	1,240	"
KMYC	Marysville, Cal.	6,646		100	100	1,450	"
KYOS	Merced, Cal.	10,135		250	.....	1,080	Daytime
KXO	El Centro, Cal.	10,017		100	100	1,490	Unlimited
KHSL	Chico, Cal.	9,287		1,000	1,000*	1,290	"
KVEC	San Luis Obispo, Cal.	8,881		250	250	1,230	"

APPENDIX A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
KDON	Monterey, Cal.	10,084		250*	250*	1,240	Unlimited
KVCV	Redding, Cal.	8,109		250	250	1,230	"
KOOS	Marshfield, Ore.	5,259		250	250	1,230	"
KWLK	Longview, Wash.	12,385		250	250	1,400	"
KRNR	Roseburg, Ore.	4,924		250	250*	1,490	"
KELA	Centralia, Wash.	7,414		1,000	1,000	1,470	"
KWIL	Albany, Ore.	5,654		250	250	1,240	"
KAST	Astoria, Ore.	10,389		250	250	1,230	"
		NORTHEAST GROUP					
WJW	Akron, Ohio	349,705		250	250	1,240	"
WABY	Albany, N. Y.	431,575		250	250	1,400	"
WILM	Wilmington, Del.	188,974		250	250	1,450	"
WARM*	Wilkes-Barre-Scranton, Pa.	629,581		250	250	1,400	"
WHBC	Canton, Ohio	200,352		250	250	1,230	"
WKBO	Harrisburg, Pa.	173,367	N.B.C. Red, Blue	250	250	1,230	"
WNBF	Binghamton, N. Y.	145,156	C.B.S.	5,000*	5,000*	1,290*	"
WBAX	Wilkes-Barre-Scranton, Pa.	629,581		100	100	1,240	"
WGAL	Lancaster, Pa.	132,027	N.B.C. Red, Blue	250	250	1,490	"
WORK	York, Pa.	92,627	N.B.C. Red, Blue	1,000	1,000	1,350	"
WENY	Elmira, N. Y.	45,106		250	250	1,230	"
WSTV	Steubenville, Ohio	37,651		250	250	1,340	"
WEST	Easton, Pa.	33,589		250	250	1,400	"
WLBZ	Bangor, Me.	29,822	N.B.C. Red, Blue	5,000*	5,000*	620	"
WEIM*	Fitchburg, Mass.	41,824		250	250	1,340	"
WPAY	Portsmouth, Ohio	40,466		250*	250*	1,400	"
WJEJ	Hagerstown, Md.	32,491		250	250	1,240	"

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WAZL	Hazleton, Pa.	38,009		250	250	1,450	Unlimited
WRDO	Augusta, Me.	19,360	N.B.C. Red, Blue	100	100	1,400	"
WFEA	Manchester, N. H.	77,685	N.B.C. Red	5,000*	5,000*	1,370	"
			Mid-West Group				
KOIL	Council Bluffs-Omaha, Ia.-Neb.	287,698	C.B.S.	5,000	5,000	1,290	"
KSO	Des Moines, Ia.	183,973	N.B.C. Blue	5,000	5,000*	1,460	"
WLAV	Grand Rapids, Mich.	209,873		250	250	1,340	"
KFBI	Wichita, Kans.	127,308		5,000	1,000	1,070	"
WROK	Rockford, Ill.	105,259		1,000	500	1,440	"
KGHI	Little Rock, Ark.	126,724		250	250	1,230	"
WMT	Cedar Rapids, Ia.	73,219	C.B.S.	5,000	5,000	600	"
KDTH	Dubuque, Ia.	43,892		1,000	1,000	1,370	"
KSAL	Salina, Kans.	21,073		1,000	1,000	1,150	"
KOTN	Pine Bluff, Ark.	21,290		250	250	1,490	"
KWFC	Hot Springs, Ark.	21,370		250	250	1,340	"
KWOS	Jefferson City, Mo.	24,268		250	250	1,240	"
KTSW	Emporia, Kans.	13,188		250	250	1,400	"
KGGF	Coffeyville, Kans.	17,355		1,000	500	690	"
KBTM	Jonesboro, Ark.	11,729		250	100	1,230	"
KMA	Shenandoah, Ia.	6,846	N.B.C. Blue	5,000	1,000	960	"
KVGB	Great Bend, Kans.	9,044		250	250	1,400	"
			Southeast Group				
WRNL	Richmond, Va.	245,674	N.B.C. Blue	5,000*	5,000*	910	"
WGH	Portsmouth-Newport News-Norfolk, Va.	323,326		250	250	1,340	"

APPENDIX A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
WSOC	Charlotte, N. C.	112,986	N.B.C. Red	250	250	1,240	Unlimited
WSLS	Roanoke, Va.	110,593		250	250	1,490	"
WCOS	Columbia, S. C.	89,565	N.B.C. Blue	250	250	1,400	"
WCMI	Huntington-Ashland, W. Va.-Ky.	170,979		250	250	1,340	"
WAIR	Winston-Salem, N. C.	109,833		250	250	1,340	"
WMRC	Greenville, S. C.	34,734		250	250	1,490	"
WRAL	Raleigh, N. C.	46,897		250	250	1,240	"
WLVA	Lynchburg, Va.	44,541		250	250	230	"
WBTM	Danville, Va.	32,749		250	250*	1,400	"
WSTP	Salisbury, N. C.	19,037		250	250	1,490	"
WBBB	Burlington, N. C.	12,198		1,000	.....	920	Daytime
			Southern Group				
WATL	Atlanta, Ga.	442,294		250	250	1,400	Unlimited
WNOE	New Orleans, La.	540,030		250	250	1,450	"
WMPS	Memphis, Tenn.	332,477	N.B.C. Blue	1,000	500	1,460	"
WGRC	Louisville, Ky.	434,408		250	250	1,400	"
WSGN	Birmingham, Ala.	407,851	N.B.C. Blue	1,000	1,000	610	"
WSIX	Nashville, Tenn.	241,769		5,000*	5,000*	980*	"
WJHP	Jacksonville, Fla.	195,619	N.B.C. Blue	250	250	1,320	"
WDEF	Chattanooga, Tenn.	193,215		250	250	1,400	"
WBIR	Knoxville, Tenn.	151,829		250	250	1,240	"
WTSP	St. Petersburg-Tampa, Fla.	209,693		1,000	500	1,380	"
WGBF	Evansville, Ind.	141,614	N.B.C. Red, Blue	5,000	1,000	1,280	"

WLAP	Lexington, Ky.	49,304		250	250	1,450	Unlimited
WMOB	Mobile, Ala.	114,906		250	250	1,230	"
WBML	Macon, Ga.	74,830		250	250	1,240	"
WJBY	Gadsden, Ala.	36,975		250	250	1,240	"
WTJS	Jackson, Tenn.	24,332		1,000*	1,000*	1,390	"
WALB	Albany, Ga.	19,055		1,000	1,000	1,590	"
WRUF	Gainesville, Fla.	13,757		5,000	.....	850	L-KOA
WHBB	Selma, Ala.	19,834		100	100	1,490	Unlimited
WMSL	Decatur, Ala.	16,604		250	250	1,400	"
WBLJ	Dalton, Ga.	10,448		250	250	1,230	"
WDAK	West Point, Ga.	3,591		250	250	1,340	"
			Southwest Group				
KXYZ	Houston, Tex.	510,397	N.B.C. Blue	5,000*	5,000*	1,320*	"
WRR	Dallas, Tex.	376,548		5,000*	5,000*	1,310	"
KABC	San Antonio, Tex.	319,010		250	250	1,450	"
KFJZ	Fort Worth, Tex.	207,677		5,000*	5,000*	1,270	"
KOCY	Oklahoma City, Okla.	221,229		250	250	1,340	"
KOME	Tulsa, Okla.	188,562	N.B.C. Blue	250	250	1,340	"
KNOW	Austin, Tex.	106,193		250	250	1,490	"
KRIS	Corpus Christi, Tex.	70,677	N.B.C. Red, Blue	1,000	1,000	1,360	"
KPAC	Beaumont-Port Arthur, Tex.	138,608		500	500	1,250	"
KFDA	Amarillo, Tex.	53,463		250	250	1,230	"
WACO	Waco, Tex.	71,114		250	250	1,450	"
KGKL	San Angelo, Tex.	25,802		250	250	1,400	"

APPENDIX A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
KCMC	Texarkana, Tex.	28,840		250	250	1,450	Unlimited
KRBC	Abilene, Tex.	26,612		250	250	1,450	"
KBST	Big Spring, Tex.	12,604		100	100	1,490	"
KRRV	Sherman, Tex.	17,156		1,000	1,000	910	"
KTEM	Temple, Tex.	15,344		250	250	1,400	"
KRGV	Weslaco, Tex.	6,883	N.B.C. Red, Blue	1,000	1,000	1,290	"
			Northwest Group				
WHBL	Sheboygan, Wis.	40,368		1,000*	1,000*	1,330	"
WHBY	Appleton, Wis.	28,436		250	250	1,230	"
WFHR	Wisconsin Rapids	11,416		250	250	1,340	"
KFIZ	Fond Du Lac, Wis.	27,209		250	250	1,450	"
WSAU	Wausau, Wis.	27,268		250	250	1,400	"
WHDF	Calumet, Mich.	Under 5,000		250	250	1,400	"
WDSM	Duluth-Superior, Minn.-Wis.	157,098		100	100	1,230	"
KTRI	Sioux City, Ia.	87,791		250	250	1,450	"
KVOX	Fargo-Moorhead, N. D.	42,071		250	250	1,340	"
KVFD	Ft. Dodge, Ia.	22,904		250	250	1,400	"
KWNO	Winona, Minn.	22,490		250	250	1,230	"
KGCU	Bismarck-Mandan, N. D.	22,181		250	250	1,270	"
KABR	Aberdeen, S. D.	17,015		5,000	5,000	1,420	"
KLPM	Minot, N. D.	16,577		1,000	1,000	1,390	"
KATE	Albert Lea, Minn.	12,200		250	250	1,450	"
KGDE	Fergus Falls, Minn.	10,048		250	100	1,230	"
KRMC	Jamestown, N. D.	8,790		250	250	1,400	"

KDLR	Devils Lake, N. D.	6,204		250	250	1,240	Unlimited
KWLM	Willmar, Minn.	7,623		250	250	1,340	"
WJMS	Ironwood, Mich.	13,369		250	250	1,450	"
WATW	Ashland, Wis.	11,101		100	100	1,400	"
			Mountain Group				
KLO	Ogden-Salt Lake City, Utah	204,488	N.B.C. Blue	5,000	5,000	1,430	"
KFXJ	Grand Junction, Colo.	12,479		1,000*	500*	920*	"
KFKA	Greeley, Colo.	15,995		1,000	1,000	910	S-KPOF
KOVO	Provo, Utah	18,071		250	250	1,240	Unlimited
KEUB	Price, Utah	5,214		250	250	1,450	"
			Group Outside United States				
KGMB	Honolulu, T. H.			5,000	5,000	590	"
KHBC	Hilo, T. H.			250	250	1,230	"
KGBU	Ketchikan, Alaska			500	500	930	"
CKLW	Windsor, Ontario (Previously listed)						

* Construction permit only.

NOTE: The affiliations and facilities above listed are corrected to November 1, 1941. City populations based on 1940 census figures, metropolitan district figures used whenever applicable. Affiliations based upon November 1, 1941 edition of Standard Rate and Data, except Mutual, whose affiliations are based upon its own files.

[Fed. 102]

APPENDIX B

Comparison of Facilities of Broadcast Stations Affiliated with the Four National Networks

(As of November 1, 1941)

Full-time Stations

	Size of City	National (Red)	National (Blue)	Columbia	Mutual
Clear Channel 50 kw.	1,000,000 up	9[1]	3[2]	6	2
	500,000 "	3	1	6	..
	100,000 "	6	3	8	..
	25,000 "	1	1	..	..
		19[3]	8[3]	20	2
Clear Channel below 50 kw.	1,000,000 up	..	2	..	..
	500,000 "	..	..	..	..
	100,000 "	1	5	5	3
	25,000 "	1	..	2	1
	10,000 "	..	1	..	1
		2[4]	8[4]	7	5[5]
Regional (1 kw. to 5 kw.)	1,000,000 up	3	6	5	8
	500,000 "	8	7	5	8
	100,000 "	28	22	34	19
	25,000 "	16	20	20	9
	10,000 "	4	5	4	9
	5,000 "	..	2	1	4
	5,000 down	1	..	..	..
		60[6]	62[6]	69	57[7]
Regional (less than 1 kw. at night)	1,000,000 up	..	..	..	..
	500,000 "	..	..	..	..
	100,000 "	2	5	..	7
	25,000 "	2	2	..	..
	10,000 "	1	2	..	1
		5[8]	9[8]	..	8[9]
Local (100 w. to 250 w.)	1,000,000 up	..	1	..	..
	500,000 "	1	3	..	4
	100,000 "	11	12	8	24
	25,000 "	8	24	6	35
	10,000 "	12	16	6	30
	5,000 "	2	4	..	10
	5,000 down	1	1	..	3
		35[4]	61[4]	20	106[10]

[fol. 463]

APPENDIX B—Continued

Comparison of Facilities of Broadcast Stations Affiliated with the Four National Networks

(As of November 1, 1941)

Part-time Stations

	Size of City	National (Red)	National (Blue)	Columbia	Mutual
Clear Channel 50 kw.	100,000 up	1	..	..	..
		1	..	..	..
Clear Channel below 50 kw.	500,000 up	..	..	..	1
	100,000 "	..	1	..	1
	25,000 "	1	1	..	..
	10,000 "	1	1	1	2
		2[2]	3[3]	1	4
Regional (1 kw. to 5 kw.)	1,000,000 up	..	..	..	1
	500,000 "	..	1	1	..
	100,000 "	..	..	..	..
	25,000 "	..	..	1	..
	10,000 "	..	..	..	2
		..	1	2	3
Regional (less than 1 kw. at night)	1,000,000 up	..	..	..	..
	500,000 "	..	..	..	..
	100,000 "	1	1	..	..
		1[4]	1[4]	..	..
Local (100 w. to 250 w.)	25,000 up	..	..	..	1
		..	..	..	1
Total		125	153	119	186

[1] WFAA–WDAP treated as one full-time station.
[2] WENR–WLS treated as one full-time station.
[3] Includes 2 stations affiliated with both Red and Blue.
[4] Includes 1 station affiliated with both Red and Blue.
[5] Includes 1 station primarily affiliated with N.B.C. Blue.
[6] Includes 19 stations affiliated with both Red and Blue.
[7] Includes 3 stations primarily affiliated with Columbia, 4 with both N.B.C. Red and Blue, 7 with N.B.C. Blue, and 2 with N.B.C. Red.
[8] Includes 4 stations on both N.B.C. Red and Blue.
[9] Includes 3 stations primarily with N.B.C. Blue.
[10] Includes 3 stations primarily affiliated with both N.B.C. Red and Blue, 3 with N.B.C. Blue, and 1 with N.B.C. Red.

Note.—Only stations within continental United States are considered. Population figures based upon 1940 census, with metropolitan districts used when applicable. Classifications include facilities authorized by construction permit only.

[fol. 404]

APPENDIX C

Affiant's Letter to Mutual Stockholders, October 31, 1941

Mutual Broadcasting System, Inc.

New York Office: 1440 Broadway, New York

October 31, 1941.

To: Stockholders of the Mutual Broadcasting System:

As you are aware, the Monopoly Regulations of the Federal Communications Commission become effective on November 15, 1941. In view of the short time remaining before that effective date, we send you herewith a letter agreement modifying your existing contract with Mutual, and request that you immediately execute it and return it to us.

We are at present preparing new contracts which will embody the various changes required by the Monopoly Regulations, as well as other changes which have been discussed at our Board of Directors Meetings. These contracts will be submitted to you as soon as possible, after which the date of the next meeting of the Board of Directors will be advised.

Your cooperation in immediately returning the enclosed agreement, signed by you, to our Chicago office, attention of Mr. E. M. Antrim, will be greatly appreciated.

With kindest regards, Fred Weber.

FW:mk
Enc.

APPENDIX D

Mutual's Agreement with its Stockholders, October 31, 1941

Mutual Broadcasting System, Inc.

Branch Office: 1440 Broadway, New York

October 31, 1941.

GENTLEMEN:

Confirming the understanding between us, it is agreed that notwithstanding anything to the contrary contained in the contract between you and the Mutual Broadcasting System, Inc.,

[fol. 405] (1) The option time referred to in said contract shall be exclusive, except as against other network organizations, it being understood that notwithstanding such option time, y a will not be prevented or hindered from optioning (under non-exclusive options) or selling any or all of said option time, or other time, to other network organizations. You will clear and furnish to Mutual any period or periods of time within said option time for broadcasting of any Mutual commercial network program or programs upon fifty-six (56) days' notice from Mutual, unless prior to such notice from Mutual you shall have actually made a bona fide sale to another network organization of the period or periods of time within said option time required by Mutual for the advertiser. No commitment to any other network organization made in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission shall be deemed to be a bona fide sale for the purpose of this paragraph. You may refuse to execute a commitment to furnish broadcasting time to Mutual for the broadcasting of any program or programs which you reasonably believe to be unsatisfactory or unsuitable.

(2) The provision of said contract with regard to your exclusive association with Mutual is hereby revoked and rescinded.

(3) Any other provisions of said contract in violation of Section 3.101,-3.108 both inclusive of the Regulations of the Federal Communications Commission is hereby revoked and rescinded.

The provisions of this letter shall become effective immediately.

Except as herein specifically modified, said contract shall continue in full force and effect.

If the provisions of this letter meet with your approval will you please indicate your assent thereto by affixing your signature on each of the enclosed copies of this letter and return to our Chicago Office, attention of Mr. E. M. Antrim.

Yours very truly, Mutual Broadcasting System, Inc.,
By Fred Weber, General Manager.

FW:pwh.
Approved ———.
Date ———.

[fol. 406] APPENDIX E

Mutual's Proposed Contract to Conform to the Revised Regulations

This Agreement, made at Chicago, Illinois, as of ———, 194—, between Mutual Broadcasting System, Inc., and Illinois corporation (hereinafter called "Mutual"), and ——— (hereinafter called the "Broadcaster"),

Witnesseth:

The Broadcaster is the owner and operator of radio station ———, located at ——— (hereinafter called the "Station").

Mutual is engaged in the operation of a national radio broadcasting network composed of stations which are owned or operated by or affiliated with Mutual's shareholders and of other stations which are from time to time affiliated with the Mutual network. It is the intention of Mutual and the Broadcaster that the network shall remain cooperative in character, and that the stations composing the network shall retain the advantages thereof, including: effective control on the part of such stations of the acceptance or rejection of programs to the end that the public interest may be best served; full participation in the profits of network operation, the preservation of local control and ability to meet local and regional needs in the public interest, the greater geographical diversification of program-originating points, the prevention of tendencies toward monopoly and toward concentration of program control in a small group or in a particular locality, and the furtherance of the principle of competition.

The Broadcaster and Mutual are desirous of entering into an agreement, on the terms and conditions hereinafter set forth, for the affiliation of the Station with the Mutual network and for the sale by the Broadcaster and the purchase by Mutual of broadcasting time on the Station for the broadcasting of Mutual network commercial programs.

Now, Therefore, It Is Mutually Agreed as Follows:

1. Mutual will contract with the American Telephone and Telegraph Company for the maintenance by the latter, commencing on ———, 194—, of a program transmission line extending to ———.

[fol. 407] 2. Mutual and the Broadcaster will each publicize the Station as the regular Mutual outlet in the city in which the Station is located. The Station shall have the right to the first call on Mutual network commercial and sustaining programs in said city and Mutual shall not offer any series of programs or single program (not a part of a series) to any other radio station located in said city unless said series of programs or single program has been offered to the Broadcaster for broadcasting through the Station under this contract and the Broadcaster shall have failed or refused to accept such program or programs within forty-eight (48) hours after Mutual's offer.

(A) In the case of a commercial program or a series of commercial programs:

(1) If the Broadcaster is unable to clear the required period or periods of time on the Station for such program or programs but notifies Mutual within said 48 hours that the Broadcaster can clear a mutually satisfactory substitute period or periods and is able and willing to broadcast the program or programs by means of off-the-line recordings (made by the Broadcaster without cost to Mutual or the advertiser) during such substitute period or periods, Mutual will accept such substitute period or periods, unless the advertiser is unwilling to accept such broadcasting by the Station by means of off-the-line recordings during such substitute period or periods, it being understood that Mutual is not obligated to require the advertiser to accept such delayed broadcasting; and

(2) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs scheduled to run for thirteen weeks or more or a series of separable programs, but notifies Mutual within said 48 hours that the Broadcaster will clear said periods of time upon a specified date not later than four (4) weeks after the commencement of the series of programs, Mutual will contract for such periods of time on the Station as of the specified date upon which the Broadcaster is able to clear such periods, unless the advertiser refuses to accept such postponement of broadcasting on the Station.

If the Broadcaster fails or refuses to accept said program or programs or if the Broadcaster is unable to clear the required period or periods of time and Mutual is unable

[fol. 408] to persuade the advertiser to use a substitute period or periods or to postpone the commencement of such programs on the Station, as provided in the preceding sub-paragraphs, Mutual may contract with any other station located in said city for the broadcasting of said commercial program or programs.

(B) In the case of a single sustaining program or series of sustaining programs:

(1) If the Broadcaster is unable to clear the required period or periods of time for such program or programs but notifies Mutual that the Broadcaster will broadcast the program or programs by transcription at a mutually satisfactory substitute period or periods, Mutual will not offer said program or programs to any other station in said city; and

(2) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs, Mutual, in offering said series of programs to any other station in said city, will offer said series subject to recapture by the Station on one (1) week's notice to Mutual.

It is understood, however, that notwithstanding the foregoing, Mutual may make available to any other station in said city special sustaining programs of great public importance (such as, but not limited to, addresses of the President of the United States).

3. Mutual will use its best efforts to secure contracts from advertisers for the broadcasting of commercial programs through the Station, as well as through all other stations regularly affiliated with Mutual, but Mutual does not undertake to refuse any commercial programs simply because the advertiser refuses to purchase coverage in the city in which the Station is located. The Broadcaster will sell broadcasting time on the Station to Mutual for broadcasting commercial programs, and will broadcast such programs through the Station, on the following terms and conditions:

(A) The Broadcaster hereby grants to Mutual an option on the periods of time on the Station specified in Exhibit A hereto attached, hereinafter called the "Mutual option time". This option shall be exclusive, except as

against other network organizations, it being understood that the granting of this option to Mutual shall not prevent or hinder the Broadcaster from optioning (under nonexclu- [fol. 409] sive options) or selling any or all of the Mutual option time, or other time, to other network organizations. The Broadcaster will clear and furnish to Mutual any period or periods of time within the Mutual option time for the broadcasting of any Mutual commercial network program or programs upon fifty-six (56) days' notice from Mutual, unless prior to such notice from Mutual the Broadcaster shall have actually made a bona fide sale to another network organization of the period or periods of time required by Mutual for the advertiser. No commitment to any other network organization made in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission shall be deemed to be a bona fide sale for the purpose of this contract. The Broadcaster may refuse to execute a commitment to furnish broadcasting time to Mutual for the broadcasting of any program or programs which the Broadcaster reasonably believes to be unsatisfactory or unsuitable. (Mutual will use its best efforts to supply to the Broadcaster such information as it may request regarding any proposed program or programs.)

(B) If the period or periods of time on the Station required for broadcasting any Mutual network commercial program or programs are outside the Mutual option time and if the Broadcaster elects to sell such required period or periods of time to Mutual for the broadcasting of such program or programs, such time shall be sold to Mutual on the terms and conditions contained in the following subparagraphs of this paragraph, i.e., on the same terms and conditions as time within the Mutual option time is sold to Mutual.

(C) Mutual will charge each advertiser at the following rates, for broadcasting time on the Station furnished to such advertiser by Mutual:

(1) In order to encourage the use by advertisers of a greater number of stations affiliated with Mutual for the broadcasting of the advertiser's programs, Mutual has established special competitive volume discounts for advertisers contracting for periods of time on a substantial number of such stations. The minimum number of stations

which must be used to entitle the advertiser to such special volume discounts is, at present, 76 stations, but it is understood that Mutual may increase or decrease this minimum from time to time, if Mutual finds it necessary or desirable to do so to meet competitive conditions. Accordingly, if [fol. 410] any advertiser contracts with Mutual for periods of time on at least the number of stations then specified by Mutual as the minimum number of stations necessary to entitle the advertiser to such special volume discounts, Mutual will charge the advertiser for time on the Station at a Volume Network Rate equal to the Station's single-time rate for the period of time used on any day, in the applicable time classification, less the applicable special volume discount specified below, depending upon the number of programs broadcast by Mutual for the advertiser during a period of fifty-two consecutive weeks:

13 broadcasts—20% discount
26 broadcasts—25% discount
52 broadcasts—35% discount
104 Broadcasts—40% discount
156 broadcasts—42½% discount
208 broadcasts—45% discount
260 broadcasts—50% discount

No such special volume discount, however, will be allowed to any advertiser with respect to time purchased by the Advertiser under any contract for a term of less than thirteen consecutive weeks. In computing the Volume Network Rate for the programs of any advertiser, the Station's single-time rates will be deemed to be the Station's published card rates for national advertisers in effect on the date the Broadcaster executes its commitment in connection with such advertiser's programs, or the single-time rates then charged or quoted by the Broadcaster to national advertisers for time on the Station, if such rates are lower than the Station's published card rates. (It is understood that if the advertiser uses two or more fifteen-minute units on any day, the total daily amount of time used by the advertiser may, for the purpose of determining the single-time rate to be used in computing the charges to the advertiser, be treated as an uninterrupted period, and, if two or more fifteen-minute units used by the advertiser fall in different time classifications, the single-time rates in such classifications will be averaged. Any advertiser

that shall have completed two hundred sixty broadcasts during a period of fifty-two successive weeks of broadcasting at the Volume Network Rate and shall continue such broadcasting without interruption shall be entitled to receive the Volume Network Rate for 260 broadcasts for the [fol. 411] additional period of successive weeks during which the advertiser uses the same periods of time.

(2) Mutual will charge any other advertiser for time on the Station at the Station's rates for such time in effect on the date the Broadcaster executed a commitment in connection with such advertiser's program or programs, less the applicable discounts customarily allowed by the Broadcaster to advertisers.

These rates will, of course, be subject to the customary 15% agency commission to recognized advertising agencies. The term "advertiser" as used in this contract shall mean the advertiser or the advertising agency signing a contract for an advertiser, as the case may be.

(D) Mutual will pay the Broadcaster for all broadcasting time used by Mutual on the Station a net sum equal to Mutual's actual receipts from advertisers for such time, at the rates specified in paragraph (A) above, less the sum of the following:

(1) —% of such receipts from advertisers;
(2) Line and service charges of $——— per month;
( ) License fees payable by Mutual to the American Society of Composers, Authors and Publishers and other copyright licensing organizations with respect to the broadcasting through the Station of Mutual commercial and sustaining network programs.

If Mutual is, for any reason, unable to collect the entire amount billed to any advertiser (or its advertising agency) for broadcasting time on all participating stations, the receipts for time on the Station will, of course, be deemed to be a pro rata share of the amount actually collected, the share to be allocated to the Broadcasting depending upon the number of stations broadcasting said programs, the respective time charges of such stations, and the interruptions and appropriations occurring with respect to said programs.

(E) Mutual will furnish a monthly statement to the Broadcaster on or before the last day of each month setting forth the above accountings with respect to the preceding month, and will accompany such statement with the sum, if any, due the Broadcaster.

(F) The Broadcaster will sign a commitment in the form attached hereto in connection with each advertiser's pro- [fol. 412] gram or programs submitted by Mutual and accepted by the Broadcaster and, when Mutual consummates its contract with the advertiser, Mutual will sign and return the commitment to the Broadcaster. Unless Mutual gives the Broadcaster written notice that it desires to terminate the commitment, any commitment (for the sale by the Broadcaster and the purchase by Mutual of time on the Station) which is in force at the date of the termination of this contract shall not be affected in any manner by such termination of this contract, except that thereafter Mutual, in computing its payments to the Broadcaster for such time, shall only be entitled to deduct from Mutual's receipts for such time the percentages and license fees specified in paragraph (D) above, and the actual cost of the temporary line facilities necessary to deliver the advertiser's programs to the Broadcaster.

(G) Notwithstanding the execution of a commitment by the Broadcaster to broadcast any advertiser's program or programs as hereinabove provided, the Broadcaster may refuse to broadcast any such program which, in its opinion, is contrary to the public interest or the Broadcaster may substitute for any such program a program of outstanding local or national importance. The Broadcaster will give Mutual as much notice of the Broadcaster's intention to refuse any program or to substitute another program as circumstances permit.

(H) If for any reason the Broadcaster shall enter into a contract with any advertiser for the broadcasting of any Mutual program (i.e., a program being transmitted over the Mutual lines) under the provisions of which the Broadcaster, instead of Mutual, shall receive the payments made by the advertiser for broadcasting time on the Station, the receipts of the Broadcaster from such advertising shall (for the purpose of determining the amount of the deductions provided in paragraph (D) above, but for no other pur-

pose) be deemed a part of Mutual's receipts from advertisers for broadcasting time on the Station.

4. If Mutual's receipts from advertisers for time on the Station for any month shall not equal the sum of the deductions provided in paragraph (D) above for such month, the Broadcaster will pay Mutual the deficiency promptly upon the receipt of a statement from Mutual of such deficiency. To secure the prompt payment of any such deficiencies, the Broadcaster will maintain the sum of $——— [fol. 41.] on deposit with Mutual. Such deposit, if not theretofore exhausted, shall be applied to the payment of any deficiency for the last month of this contract. Any portion of such deposit not so applied shall be refunded to the Broadcaster by Mutual upon the termination of this contract.

5. Mutual agrees to use its best efforts to obtain from its various affiliated stations and to otherwise develop sustaining programs of high quality, including: broadcasts of national and international events, speeches by national and international figures in the fields of government, education, religion, agriculture, and the arts, broadcasts of operas, symphony concerts, and other musical events, dramatic presentations and other educational or entertainment programs of general interest, for broadcasting by the stations composing its network. So long as the Broadcaster shall faithfully perform all of its agreements herein contained, Mutual will transmit to the Broadcaster for broadcasting by the Station such Mutual sustaining programs as may from time to time be transmitted over Mutual's Chicago——— line, unless Mutual is prevented from so doing by causes beyond its control, or unless such transmission might involve Mutual or the originating station in a labor dispute. The Broadcaster shall not, without the prior consent of Mutual, broadcast any of these programs as sponsored programs or in any other manner use any of these programs or permit them to be used for commercial purposes, shall not furnish any of these programs to any other station, shall not make any transcription or recording of any of these programs, except for delayed broadcasting on the Station, and shall not consent to the rebroadcasting of any of these programs by any other station. The Broadcaster agrees to make available to Mutual, for transmission to the other stations affiliated with the Mutual network, the outstanding

sustaining programs produced or developed by the Broadcaster.

6. The Broadcaster agrees that during the term of this contract it will not enter into any contract with any person, firm or corporation wherein the Broadcaster agrees to broadcast programs through the Station exclusively for any other network or wherein the Broadcaster gives such network any exclusive option on, or exclusive priority rights over, any broadcasting time on the Station. The Broad- [fol. 414] caster further agrees that it will not discriminate against Mutual and in favor of any other network organization in the sale of its broadcasting time, in that, if it sells broadcasting time to any other network organization, it will, in acting upon requests for the same period of time from Mutual and such other network organization, adhere to the principle of first-come-first-served. The Broadcaster further agrees that it will not make any commitment with respect to any period or periods of time on the Station to any other network organization in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission. If the Broadcaster shall enter into any contract or agreement with any other network organization or shall enter into any contract or agreement with any person, firm or corporation for the broadcasting of any program to be transmitted to the Station by any other network organization, the Broadcaster agrees to furnish Mutual with a true and complete copy of such contract or agreement within five (5) days after it is executed or made. The Broadcaster further agrees to give Mutual written notice of any sale of broadcasting time on the Station within the Mutual option time made to any other network organization, pursuant to any such contract or agreement. Such notice shall be given to Mutual by the Broadcaster within five (5) days after the commitment to furnish the broadcasting time is made by the Broadcaster and shall specify the period or periods of time to be furnished, the date or dates upon which such period or periods are to be furnished, the network organization to which such period or periods are to be furnished, the advertiser whose program or programs are to be broadcast during said period or periods and the compensation to be received by the Broadcaster for said period or periods.

7. This agreement shall, unless sooner terminated as hereinafter provided, remain in effect for a period of — years, ending —— —, 194—, and shall then be renewed on the same terms and conditions for a further period of —— years, and so on for successive further periods of —— years each, unless and until either party shall, at least —— days prior to the expiration of the then current term, give the other party written notice that it does not desire to have the contract renewed for a further period.

8. If any of the licensees of radio stations contributing to the cost of Mutual's program transmission line extend- [fol. 415] ing to —— —— shall cease to make such contributions, Mutual may give written notice to the Broadcaster of Mutual's desire to terminate this contract, such notice to be given by registered mail at least thirty (30) days prior to the date upon which Mutual proposes that the termination shall become effective. This contract will terminate on the effective date specified in Mutual's notice, unless the Broadcaster shall, within ten (10) days after the date of Mutual's notice, deliver to Mutual a binding agreement by the Broadcaster to pay to Mutual, during the remainder of the term of this contract, an additional amount each month equal to the contributions theretofore made by the licensee or licensees ceasing to make such contributions.

9. If the ownership or control of the Station or of the controlling interests in the capital stock of the Broadcaster shall be voluntarily or involuntarily transferred from its present holder or holders, Mutual may terminate this contract by giving written notice to the Broadcaster by registered mail at least thirty (30) days prior to the date upon which such termination is to become effective.

10. The Broadcaster agrees that it will not use the name "Mutual Broadcasting System" or any similar name, except pursuant to the terms and conditions of this contract and in a manner consistent with its provisions.

11. It is understood and agreed that neither of the parties is the agent or representative of the other for any purpose whatsoever and that no partnership relationship exists between the parties.

12. This agreement is subject to all present and future rules, regulations, and orders of the Federal Communica-

tions Commission and to all laws of the United States of America now or hereafter in force.

In Witness Whereof, the parties hereunto have executed this contract, or have caused it to be executed by their duly authorized officers, as of the day and year first above written, on the respective dates indicated after their signatures.

MUTUAL BROADCASTING SYSTEM, INC.
By .....
Date .....

By .....
Date .....

Summary of Available Full-Time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
Ten or More Full-time Commercial Stations					
New York, N. Y.[2]	11,690,520	1	6	14	3
Los Angeles, Cal.	2,904,596	3	8	13	4[3]
Nine Full-time Commercial Stations					
Chicago, Ill.[2]	4,499,126	2	5	9	5
San Francisco-Oakland, Cal.	1,428,525	9	8	9	3
Eight Full-time Commercial Stations					
Boston, Mass.[2]	2,350,514	5	6	8	3
Seven Full-time Commercial Stations					
Philadelphia, Pa.[2]	2,898,644	4	5	7	3
Six Full-time Commercial Stations					
Detroit, Mich.[2]	2,295,867	6	3[4]	6[4]	3
Washington, D. C.[2]	907,816	13	4	6	3
Kansas City, Kans.-Kansas City, Mo.[2]	634,093	18	5[5]	6[4]	3[6]
Seattle, Wash.	452,639	24	5	6	3
Five Full-time Commercial Stations					
Pittsburgh, Pa.[2]	1,994,060	7	4[4]	5	3
St. Louis, Mo.[2]	1,387,977	8	4	5	3
Baltimore, Md.[2]	1,046,692	11	3	5	3
Minneapolis-St. Paul, Minn.[2]	911,077	12	4	5	3
Buffalo-Niagara Falls, N. Y.[2]	857,719	14	3	5	4[6]
Cincinnati, O.[2]	789,309	16	4	5	3
New Orleans, La.	540,030	20	3	5	3

[fol. 417]

Portland, Ore.	406,406	30	4	5	3
Denver, Colo.	384,372	32	4	5	3
San Antonio, Tex.	319,010	42	2	5	3
Four Full-time Commercial Stations					
Providence, R. I.[8]	711,500	17	0[9]	4	3
Scranton-Wilkes-Barre, Pa.	629,581	19	0	4[10]	1[10]
Hartford-New Britain, Conn.[8]	502,193	22	2	4	3
Indianapolis, Ind.[8]	455,357	23	4	4	3
Atlanta, Ga.	442,294	25	3	4	3
Louisville, Ky.[11]	434,408	26	2	4	3
Albany-Schenectady-Troy, N. Y.[8]	431,575	27	1	4	3
Springfield-Holyoke, Mass.[12]	394,623	31	2	4	2
Dallas, Tex.	376,548	33	4[13]	4[13]	3[14]
Memphis, Tenn.	332,477	39	3	4	3
Syracuse, N. Y.[15]	258,352	48	4	4	2
Oklahoma City, Okla.	221,229	53	4	4	3
Tampa-St. Petersburg, Fla.	209,693	56	4	4	3
Fort Worth, Tex.	207,677	57	4[16]	4[16]	3[16]
Tacoma, Wash.	156,016	76	2	4	0
Spokane, Wash.	141,370	84	3	4	3

APPENDIX F—Continued

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
Three Full-time Commercial Stations					
Cleveland, O.[2]	1,214,943	10	3	3	3
Milwaukee, Wis.	790,336	15	3	3	3
Houston, Tex.	510,307	21	3	3	3
Rochester, N. Y.[3]	411,970	28	2	3	2
Birmingham, Ala.	407,851	29	2	3	2
Youngstown, O.	373,428	34	2	3	2
Akron, O.[3]	349,705	36	2	3	2
Worcester, Mass.[3]	306,194	44	2	3	2
Omaha-Council Bluffs, Nebr.-Ia.[3]	287,698	45	2	3	2
San Diego, Cal.	256,368	49	2	3	2
Miami, Fla.	250,537	50	3	3	1
Richmond, Va.[3]	245,674	51	3	3	3
Nashville, Tenn.	241,709	52	3	3	3
Salt Lake City, Utah	204,488	58	2	3	2
Jacksonville, Fla.	195,619	63	3	3	3
Chattanooga, Tenn.	193,215	64	1	3	3
Tulsa, Okla.	188,562	66	2	3	3
Des Moines, Ia.[2]	183,973	68	2	3	3
Duluth-Superior, Minn.-Wis.	157,098	75	3	3	3
Knoxville, Tenn.	151,529	78	3	3	3
Beaumont-Port Arthur, Tex.	138,608	85	3	3	2
Wichita, Kans.	127,308	92	3	3	2

[fol. 419]

Little Rock, Ark.	126,724	93	3	3	2
Phoenix, Ariz.	121,828	94	3	3	2
Shreveport, La.	112,225	101	3[17]	3[17]	2[17]
Springfield, Mo.	70,514	135	3	3	1
Two Full-time Commercial Stations					
Columbus, O.[18]	385,796	35	2	2	2
Toledo, O.[18]	341,663	37	2	2	2
Lowell-Lawrence-Haverhill, Mass.	334,980	38	2	2	1
Allentown-Bethlehem-Easton, Pa.	325,142	40	2	2	1
Norfolk-Portsmouth-Newport News, Va.	322,326	41	2	2	1
Fall River-New Bedford, Mass.	272,648	46	2	2	0
Dayton, O.[18]	271,513	47	2	2	2
Bridgeport, Conn.[18]	216,621	54	1	2	1
Grand Rapids, Mich.	209,573	55	2	2	2
Wheeling, W. Va.	196,340	62	2	2	1
Wilmington, Del.[18]	188,974	66	2	2	1
Davenport-Rock Island-Moline, Ia.-Ill.[18]	174,986	70	2	2	2
Harrisburg, Pa.[18]	173,367	71	2	2	0
Huntington-Ashland, W. Va.-Ky.	170,979	72	1	2	2
Sacramento, Cal.	158,986	74			

APPENDIX F—Continued

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941—Continued

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
Two Full-time Commercial Stations (Continued)					
Waterbury, Conn.	144,822	82	1	2	1
Evansville, Ind.	141,614	83	2	2	2
Charleston, W. Va.	136,332	96	1	2	2
Fort Wayne, Ind.[13]	134,385	88	1	2	2
Erie, Pa.	134,039	89	2	2	2
Savannah, Ga.	117,970	95	2	2	2
El Paso, Tex.	115,801	96	2	2	2
Mobile, Ala.	114,906	97	2	2	1
Charlotte, N. C.	112,986	99	2[18]	2[18]	2[18]
Roanoke, Va.	110,593	102	2	2	1
Winston-Salem, N. C.	109,833	104	2	2	1
Portland, Me.[19]	106,566	105	2	2	2
Atlantic City, N. J.	100,096	108	2	2	1
Charleston, S. C.	98,711	109	2	2	2
Fresno, Cal.	97,504	110	2	2	2
Montgomery, Ala.	93,697	111	2	2	2
Columbia, S. C.	89,555	114	2	2	2
Springfield, Ill.	89,484	115	2	2	1
Lincoln, Nebr.[13]	88,191	116	2	2	1
Jackson, Miss.	88,003	117	2	2	2
Augusta, Ga.	87,809	118	2	2	2

Sioux City, Ia.	87,791	119	2	2	1
Manchester, N. H.	81,932	122	2	2	2
Asheville, N. C.	76,324	128	2	2	2
Macon, Ga.	74,830	129	2	2	1
Corpus Christi, Tex.	70,677	134	2	2	1[a]
Amarillo, Tex.	53,463	140	2	2	1[a]
Raleigh, N. C.[a]	46,897	162	2[a]	2[a]	1[a]
Dubuque, Ia.[a]	43,892	173	2	2	1
Tucson, Ariz.[a]	36,818	223	2	2	2
Orlando, Fla.[a]	36,736	225	2	2	2
Albuquerque, N. M.[a]	35,449	232	2[a]	2[a]	2[a]
Santa Barbara, Cal.[a]	34,958	236	2	2	1
Greenville, S. C.[a]	34,734	237	2	2	1
Bangor, Me.[a]	29,822	289	2	2	2
Bakersfield, Cal.[a]	29,252	293	2	2	1
Hot Springs, Ark.[a]	21,370	383	2	2	1
Albany, Ga.[a]	19,055	432	2	2	1
One Full-time Commercial Station					
New Haven, Conn.	308,228	43	0	1	0
Canton, O.	200,352	59	1	1	0
Trenton, N. J.	200,128	60	1	1	0

APPENDIX F—Continued

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941—Continued

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
One Full-time Commercial Station (Continued)					
Utica-Rome, N. Y.	197,128	61	1	1	1
Flint, Mich.	188,554	67	1	1	1
Reading, Pa.	175,355	69	1	1	1
Peoria, Ill.	162,566	73	1	1	1
Saginaw-Bay City, Mich.	153,388	77	1	1	1
Johnstown, Pa.	151,781	79	1	1	1
South Bend, Ind.	147,022	80	1	1	1
Binghamton, N. Y.	145,156	81	1	1	1
Racine-Kenosha, Wis.	135,075	87	1	1	0
Lancaster, Pa.	132,037	90	1	1	1
San Jose, Cal.	129,367	91	1	1	0
Altoona, Pa.	114,094	98	1	1	1
Lansing, Mich.	110,356	103	1	1	1
Austin, Tex.	106,193	106	1	1	0
Rockford, Ill.	105,259	107	1	1	0
York, Pa.	92,627	112	1	1	1
Columbus, Ga.	92,478	113	1	1	1
St. Joseph, Mo.	86,991	120	1	1	0
Berkeley, Cal.	85,547	[illegible]	1	1	0
Terre Haute, Ind.	83,370	121	1	1	1
Stockton, Cal.	79,337	123	1	1	0
Madison, Wis.	78,349	124	1	1	1

[fol. 421]

Topeka, Kans.	77,749	125	1	1	1
Springfield, O.[12]	77,406	126	1	1	1
Kalamazoo, Mich.	77,213	127	1	1	1
Cedar Rapids, Ia.[11]	73,219	130	1	1	1
Greensboro, N. C.	73,055	131	1	1	1
Galveston, Tex.	71,677	132	1	1	0
Waco, Tex.	71,114	133	1	1	0
Durham, N. C.	69,683	136	1	1	1
Decatur, Ill.	65,764	138	1	1	0
Pueblo, Colo.	62,039	139	1	1	1
No Full-time Commercial Stations					
Hamilton-Middletown, O.	112,686	100	0	0	0
Waterloo, Ia.	67,050	137	0	0	0

[fol. 421]

Summary of Cities Having Population of 50,000 or More in Which National and Columbia Restrictive Contracts with Affiliates Permit No Access, or Only a Limited Access, by Mutual
(November 1, 1941)

I

Cities in order of size having a population of 50,000 or more in which Mutual has no outlet, in which Columbia or National, or both, have restrictive contracts with full-time outlets, and in which no independent full-time outlet is available.

Cities in order of size having a population of 50,000 or more in which Mutual has no outlet, in which Columbia or National, or both, have restrictive contracts with full-time outlets, and in which no independent full-time outlet is available.

Youngstown, O.
Toledo, O.
Dayton, O.
Miami, Fla.
Utica-Rome, N. Y.
Wheeling, W. Va.
Flint, Mich.
Reading, Pa.
Peoria, Ill.
Sacramento, Calif.
Saginaw-Bay City, Mich.
Johnstown, Pa.
South Bend, Ind.
Charleston, W. Va.
Fort Wayne, Ind.
Erie, Pa.
Savannah, Ga.
El Paso, Tex.
Altoona, Pa.
Lansing, Mich.
Portland, Me.
Charleston, S. C.
Montgomery, Ala.
Columbus, Ga.
Jackson, Miss.
Augusta, Ga.
Terre Haute, Ind.
Madison, Wis.
Springfield, O.
Kalamazoo, Mich.
Greensboro, N. C.
Durham, N. C.
Pueblo, Colo.
Topeka, Kan.[28]
Asheville, N. C.

II

Cities in order of size having a population of 50,000 or more in which Mutual has a local or part-time station as an outlet, in which Columbia or National, or both, have restrictive contracts with full-time regional or clear-channel outlets, and in which no full-time regional or clear-channel facilities are available.

New Orleans, La.
Scranton-Wilkes-Barre, Pa.[29]
Hartford-New Britain, Conn.
Atlanta, Ga.
Louisville, Ky.
Albany-Schenectady-Troy, N. Y.
Rochester, N. Y.
Columbus, O.
Akron, O.
Lowell-Lawrence, Mass.
Allentown, Pa.
Norfolk, Va.
San Antonio, Tex.
Oklahoma City, Okla.
Chattanooga, Tenn.
Wilmington, Del.
Duluth-Superior, Minn.-Wis.
Knoxville, Tenn.
Little Rock, Ark.
Mobile, Ala.
Roanoke, Va.
Winston-Salem, N. C.
Sioux City, Iowa
Lincoln, Neb.
Macon, Ga.
Amarillo, Tex.

III

Cities in order of size having a population of 50,000 or more in which Mutual has as an outlet a station also used by another major network, in which Columbia or National, or both, have restrictive contracts with or own full-time regional or clear-channel outlets, and in which:

(a) There is no full-time independent station available.

Cleveland, O.
Houston, Tex.
Birmingham, Ala.
Richmond, Va.
Salt Lake City, Utah
Jacksonville, Fla.
Tulsa, Okla.
Des Moines, Ia.
Harrisburg, Pa.
Binghamton, N. Y.
Evansville, Ind.
Lancaster, Pa.
Charlotte, N. C.
York, Pa.
Columbia, S. C.
Manchester, N. H.
Cedar Rapids, Ia.

(b) The only independent full-time outlet available is a local station;

Memphis, Tenn.
Omaha, Nebr.
Bridgeport, Conn.
Spokane, Wash.
Corpus Christi, Tex.

Footnotes

[1] Although the determination of the number of full-time stations having adequate coverage throughout the various metropolitan areas presents several problems (due principally to doubts as to whether the low power local stations have adequate coverage), liberality has been exercised, and where doubt exists, the doubt has been resolved, in most instances, in favor of adequate coverage. In the preparation of this appendix, outstanding construction permits have been considered as authorizing operation in accordance therewith.

[2] Basic on both NBC Red and Blue, and CBS.

[3] Columbia owns KNX. KMPC is available as an alternate or additional station with KNX.

[4] These figures do not include CKLW, Windsor, Canada, Mutual's Detroit outlet. This station, which prior to 1935 was a Columbia affiliate, is used by Mutual because of the insufficient number of full-time stations having adequate coverage of the Detroit Metropolitan District.

Footnotes—Continued

[6] These figures include WREN, the NBC basic Blue network outlet. With the exception of one-half hour on weekdays from 2:30 to 3:00 p.m., WREN operates unlimited time.

[6] The coverage of all Pittsburgh stations, with the exception of KDKA, is doubtful because of the size of the Pittsburgh Metropolitan District.

[7] Basic on both NBC Red and Blue.

[8] Two stations are affiliated with Columbia, WGR and WKBW.

[9] Although the stations in this district adequately cover the cities in which they are located, it is doubtful whether their coverage is adequate for the entire metropolitan district. The only full-time station not affiliated under restrictive contracts with National or Columbia is WFCI in Pawtucket, R. I., a city adjacent to Providence.

[10] The Columbia station is WGBI, a station sharing time with WQAN.

[11] Basic on NBC Red and CBS.

[12] Basic on CBS.

[13] Basic on NBC Blue.

[14] These figures include KRLD and KGKO.

[15] Basic on NBC Blue and CBS.

[16] Basic on NBC Red.

[17] These figures include KWKH, 50 kw.

[18] This includes WBT, 50 kw.

[19] KRIS, a regional station, is affiliated with the Red and Blue networks of National. The same station is also used by Mutual. KEYS, a local station, has only recently been authorized to operate.

[20] This station is WPTF, 50 kw.

[21] This includes KOB, 50 kw

[22] These cities are not large enough to be classified as metropolitan districts, and are included because of the presence of more than one full-time commercial station.

[23] Berkeley is not listed as a metropolitan area; it would rank 121st in population.

[24] Columbia affiliate, operates part-time.

[25] WGBI, the Columbia affiliate, shares time with WQAN but uses most of the available time.

[fol. 427] APPENDIX G

First Cancellation of the Ballantine Program

J. Walter Thompson Company

420 Lexington Avenue,
New York,
October 23, 1941.

Mr. Sidney P. Allen, Mutual Broadcasting System, 1440 Broadway, New York City.

DEAR MR. ALLEN:

We regret that it is necessary to send you the attached cancellation of the Ballantine program. However, as discussed over the telephone we plan to move the program from the Mutual Network after the broadcast of Friday, October 31.

Whenever you are able to discuss shortrate and payment details, please let me know.

Sincerely yours, J. Walter Thompson Company, (S.) Linnea Nelson.

L. Nelson: AW.

J. Walter Thompson Company

420 Lexington Avenue,
New York.

Radio Suspension Order

October 23, 1941.

Mutual Broadcasting System, 1440 Broadway, New York City.

GENTLEMEN: Re: P. BALLANTINE & SONS:

Kindly cancel broadcasting ordered for the above client as follows:

One-half hour—9:30 to 10:00 P. M. New York Time.
44 times—once a week—every Friday.
November 7, 1941 to and including September 4, 1942.

Over Mutual coast-to-coast Network—77 stations.
There is to be no broadcasting after October 31, 1941.

[fol. 428] This was ordered on June 24, July 29, August 21 and September 12, 1941.

Kindly sign and return the enclosed copy.

J. Walter Thompson Company, Per (S.) Linnea Nelson.

APPENDIX H

Final Cancellation of the Ballantine Program

J. Walter Thompson Company

420 Lexington Avenue,
New York,
October 27, 1941.

Mr. Sidney P. Allen, Mutual Broadcasting System, 1440 Broadway, New York City.

DEAR MR. ALLEN:

Attached is radio suspension order dated October 27th, which cancels and supersedes the one previously given you dated October 23rd.

Won't you please return the October 23rd copy unsigned and the October 27th copy with signature.

Sincerely yours, J. Walter Thompson Company, (S.) Linnea Nelson.

L. Nelson: AW.
cc:Mr. Wood.

J. Walter Thompson Company

420 Lexington Avenue,
New York.

Radio Suspension Order

October 27, 1941.

Mutual Broadcasting System, 1440 Broadway, New York City.

GENTLEMEN: Re: P. BALLANTINE & SON:

Kindly cancel broadcasting ordered for the above client as follows:

One-half hours—9:30 to 10:00 P. M. New York Time.

[fol. 429] 39 times—once a week—every Friday.
December 12, 1941 to and including September 4, 1942.
Over Mutual coast-to-coast Network—77 stations.
There is to be no broadcasting after December 5, 1941.
This was ordered on June 24, July 29, August 21 and September 12, 1941.
Kindly sign and return the enclosed copy.
J. Walter Thompson Company, Per (S.) Linnea Nelson.

Appendix I

Excerpts from Trade Journals on Loss of Ballantine Program

Broadcasting.
October 27, 1941.
Page 50.

Ballantine Quits Mutual for Blue

P. Ballantine & Sons, Newark brewer, is shifting its *Three Ring Time* series from MBS to NBC-Blue, beginning on the latter network Nov. 7. Series, starring Charles Laughton, Milton Berle and Bob Crosby's orchestra, will be broadcast for 52 weeks on more than 20 Blue stations, Fridays, 8:30-9 p. m., a half-hour earlier than its present Friday evening spot on MBS.

Agency in charge of the account, J. Walter Thompson Co., New York, had nothing to say about plans for a substitute program on MBS for the duration of the contract with that network, which runs until mid-December.

In accepting the Ballantine program, NBC-Blue is deviating from the NBC code of policies and standards, which states that "alcoholic beverages may not be advertised on any network program," although individual NBC M & O stations have accepted beer advertising for local broadcasts. When this prohibition was adopted early in 1939, NBC explained that network programs must be acceptable to all parts of the country and at all times, whereas beer advertising was acceptable in some communities but not in others and was much more acceptable at some times than at others.

[fol. 430] Variety.
October 29, 1941.
Page 31.

Mutual-NBC Beer Brawl

Bitter Charges on NBC's Ways

One of Radio's Name-Calling Competitive Situations Develops as Blue Wins Account—Ballantine Will Finish 13-Week Cycle, However

"Fly" in the Suds

Radio was faced last week with one of its bitterest competitive squabbles when the J. Walter Thompson agency disclosed that the Ballantine program was switching suddenly from the Mutual Network to the NBC Blue. The furor subsided Monday (26) as NBC took the position that it would prefer to have Ballantine complete its present 13-week cycle on Mutual and that it did not want to be a party to an account's abrupt walkout from a competitive network under the circumstances that prevail.

The sudden dissipation of the proposed immediate transfer was preceded by a vigorous bombardment of charges from Mutual, with the Blue network the principal target. That the event possessed hasty litigation and publicity possibilities was immediately apparent to all when Mutual accused NBC of going to the extreme of reversing its own policy against beer advertising to wean away the account, of giving guarantees to the agency and the account against any action for damages, and of taking the program from stations presently receiving it through Mutual only to feed it back a half-hour earlier the same night at 40% less compensation to the station. The guarantee angles were stoutly denied by both NBC and the Thompson agency.

MBS' Fear

Charges of "dirty pool" were especially stressed by Mutual because of its fear that the blow will be used by rival radio salesmen and echoed by the thoughtless, including radio and other columnists, as a disparagement of Mutual. The Ballantine program with Charles Laughton, Milton Berle, Shirley Ross and Bob Crosby, was not only an important account financially but brought Mutual a name-[fol. 431] studded cast, something extremely vital to its expansion and prestige.

The Ballantine blow was followed by rumors that NBC would go even further in competitive appeals to Coca Cola,

the second big name-studded series which Mutual lined up for this season. This program has not yet begun broadcasting. Both NBC and CBS tried desperately to land the Coca-Cola contract but failed, because in some measure ASCAP music was unavailable on NBC and CBS and was available on Mutual. Personal acrimonies growing out of earlier phases of the ASCAP situation also played a part.

Sudden switch of the Ballantine Beer program may also become embroiled as an issue in the current controversy over the Federal Communications Commission's new regulations on network broadcasting. The Mutual management and legal staff have held several huddles on the matter but no decision has been made as to what trend the web's loss of the Ballantine business will take.

J. Walter Thompson, agency on the Ballantine account, had announced that the show will move into the Blue's Friday 8:30 to 9 p. m. spot Nov. 7. It would have made the first time a program had been transferred from one network to another (competitive) within the initial 13-week cycle. Acceptance of the Ballantine account involves a drastic reversal in policy on the part of NBC. Latter network had been offered the business before the program went on Mutual five weeks ago but NBC at the time refused to budge from the policy tabooing beer which has been in effect since 1936. Other recent revisions of NBC policies, but all of which have been confined to the Blue link concern the acceptance of laxative accounts and the use of recordings over a hookup.

Says Thompson

In defending its position the Thompson agency pointed out last week that the move was in line with an understanding it had with NBC at the time the agency failed to obtain facilities on the Blue for Ballantine. According to the agency, NBC was informed that if it ever changed its policy on beer to let Thompson know immediately.

Thompson got the word from NBC last Tuesday (21) and, according to the Mutual version, was given 48 hours in which to turn in an order for the Friday evening period. [fol. 432] The agency asked Mutual for a release from its contract, which covered 52 weeks but bound the account only for 13 weeks, but Mutual not only turned down the request but advised Thompson that the account would be held liable for the billings entailed in the remaining five.

weeks of the 13-week cycle. This obligation amounts to $45,800. Ballantine's appropriation for time over the 52 weeks is $200,000.

When Thompson, according to Mutual, asked for the release it gave as its reason for switching networks the fact that the Ballantine program had been dropped by the Blue's affiliates in Providence, Cleveland, Bridgeport and Jacksonville. Mutual took the matter up with Ballantine Friday (24) and the account stated that it would go along with the agency on the proposition. The last ratings on the Ballantine show have been 2.9 on the Co-operative Analysis of Broadcasting and 4.8 on the C. E. Hooper reports.

Variety.
October 29, 1941.
Page 38.

The Radio Trade is Discussing: Mutual's loss of its one big Coast show to NBC, the Ballantine ale, and the expectation that other beer accounts may go NBC.

Appendix J

Excerpt from Trade Journal on March of Time Program

Broadcasting.
October 13, 1941.
Page 66.

NBC Relaxes Rule for Time Series

To cooperate with Time Inc. and Young & Rubicam in making the March of Time, which returned to the air last week as a half-Hour Thursday evening Blue Network program, as effective as possible, NBC has relaxed its rules against dramatizations of war scenes and impersonations of world figures.

Series will also on occasion utilize recordings of speeches and of songs and music necessary for authentic radio presentation of current events, although recordings are usually forbidden from the networks except as sound effects.

[fol. 433] Everything possible to make these new *March of Time* broadcasts realistic and impressive will be done, according to NBC, where it was explained that when the

sponsor is a publishing company with full realization of its responsibility to the public it is entitled to special consideration in instances where application of the customary network rules would adversely affect the program. Each such case will be considered as it arises on its own merits, it was stated, with decisions being made as necessary from week to week.

Appendix K

Excerpts from Trade Journals on Coca-Cola Program

Variety.
October 8, 1941.
Page 24.

Blue Expects Every Affiliate to Do Its Duty to Sterling Products

NBC station relations department disclosed last week that it proposes to have a showdown with those Blue network affiliates that pass up the two Sterling Products half-hours for the Coca Cola series which will clear through Mutual. These stations have already been given their 28-day removal notices together with a warning that NBC expects them to live up to the terms of their contract.

The Blue stations involved have guaranteed to deliver 10 p. m. across the board to Mutual for the beverage account, which starts Nov. 3. After Mutual obtained the guarantees the Blue sold the 10 to 10:30 segments, Monday and Wednesday, to Sterling with Oct. 20 the starting date.

Broadcasting.
October 13, 1941.
Page 14.

Coca Cola Series Conflicts on Blue

NBC to Hold Stations for Sterling Products Pair

Stations which are affiliated both with NBC-Blue and MBS and which have been sold as outlets for both the Coca-[fol. 434] Cola broadcasts on Mutual and the Sterling Products broadcasts on the Blue have received notice from NBC they will be expected to carry the Sterling Products programs.

In sending the 28-day removal notices to the six stations involved, NBC pointed out that the two Blue programs, *Monday Merry-Go-Round* for Dr. Lyons' toothpowder and *Melody Hour* for Bayer's aspirin, occur at 10-10:30 p. m. on Monday and Wednesday evenings respectively, which is network time, and that the stations are obliged to carry them under the terms of their affiliation contracts with NBC.

Other Disputes Solved

These programs start on Oct. 20 and 22. The Mutual Coca Cola series, to begin Nov. 3, calls for 10:15-10:30 p. m. broadcasts Monday through Friday, and 10-10:30 p. m. on Saturday. Blackett-Sample-Hummert, New York, is the agency for the programs on the Blue; D'Arcy Adv. Co., St. Louis, handles the Coca-Cola advertising.

Signing of the Wednesday evening 10-10:30 program relieves NBC of the necessity of settling a dispute between R. J. Reynolds Tobacco Co. and American Tobacco Co.

Sale of the Wednesday evening spot to Sterling got NBC out of the middle of a dispute between two tobacco companies over seven Blue outlets in the West. When R. J. Reynolds Tobacco Co. moved its *Penthouse Party* to the Blue on Wednesdays, 9:30-10 p. m., it requested that these stations be removed from the schedule of the Kay Kyser show, broadcast 10-11 p. m. Wednesdays, sponsored by American Tobacco Co. for Lucky Strikes, under the NBC rule prohibiting continuous brodcast of competitive products. Latter program is a Red Network show, but used the Blue stations in the Western cities as supplementary outlets. When Sterling bought the Blue network 10-10:30 and preempted these stations, the contiguity was removed, automatically ending the dispute.

[fol. 434a] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Affidavit of HOPE H. BARROLL, JR., Executive Vice President of Baltimore Radio Show, Inc., Licensee of Station WFBR, Baltimore, Maryland, in Opposition to Motions for Preliminary Injunction.

CITY OF WASHINGTON,
District of Columbia, ss:

Hope H. Barroll, Jr., being duly sworn, upon oath deposes and says:

1. *Deponent.* I am General Manager of Station WFBR, Baltimore, Maryland, and am Executive Vice President of the Baltimore Radio Show, Inc., the company owning and [fol. 434b] operating Station WFBR. I have been connected with Station WFBR in an executive capacity since 1933 and have intimate knowledge of the operation of a station affiliated with national network companies. I am familiar with the bills of complaint and motions for a preliminary injunction filed by plaintiffs in Civil Actions 16-178 and 16-179, together with the affidavits of plaintiffs' officers in support thereof. This affidavit is filed in opposition to plaintiffs' motions for a preliminary injunction.

As the active head of a network station operating in a large metropolitan area I have knowledge of the problems connected with the network broadcasting industry, and particularly with the operations and business practices of the National Broadcasting Company, Inc., and the Mutual Broadcasting System, Inc. I am also familiar with the regulations promulgated by the Federal Communications Commission in "In the Matter of the Investigation of Chain Broadcasting" (Docket 5060 and testified before the Senate Interstate Commerce Committee on June 20, 1941 in opposition to the adoption of the so-called White Resolution (S. Res. 113, 77th Cong., 1st Sess.) directing a study of the rules and regulations of the Federal Communications Commission pertaining to network broadcasting.

2. *Network Affiliation of Station WFBR.* From 1931 to October 1, 1941 Station WFBR was affiliated with the National Broadcasting Company, Inc. and was a basic station

on the Red network operated by that company. On the latter date the station's affiliation with National Broadcasting Company, Inc. was terminated and it became an affiliate, with an option to purchase stock, of the Mutual Broadcasting System, Inc. under circumstances explained below.

3. *Permanent Assets of Station WFBR.* The permanent assets of Station WFBR have a present or depreciated value of $177,488.83. The original cost of these assets was $256,214.83.

[fol. 434c] 4. *The Option Time Clauses in Contracts between National Broadcasting Company, Inc. and Affiliates.* One of the effects of the network option time clauses in contracts between National Broadcasting Company, Inc. and its affiliates is to prevent stations from broadcasting programs of outstanding local interest during the desirable hours producing maximum listener response. Prior to October 1, 1941, the National Broadcasting Company, Inc. pursuant to contract, had an option, exercisable upon 28 days' notice, upon most of the desirable broadcasting periods of Station WFBR. This option covered the following periods:

Week Days	Sundays
10 a.m. to 12 noon	1 p.m. to 4 p.m.
3 p.m. to 6 p.m.	5 p.m. to 6 p.m.
7 p.m. to 7:30 p.m.	7 p.m. to 11 p.m.
8 p.m. to 11 p.m.	

Upon 28 days' notice to the effect that National Broadcasting Company, Inc. was scheduling a network commercial program during the option periods, the licensee of Station WFBR was required to clear time for the network commercial program and discontinue local or national spot commercial programs and even local sustaining programs of outstanding importance.

An illustration of the inability of an affiliate of National Broadcasting Company, Inc. to exercise full control over its program service and of the adverse effect upon the public interest resulting from the exercise of options on stations' time by the National Broadcasting Company, Inc., is shown by the request of National Broadcasting Company, Inc. that Station WFBR broadcast the Proctor & Gamble

program. In January, 1940 Baltimore Radio Show, Inc. received a request from the National Broadcasting Company, Inc. to broadcast a commercial program for Proctor & Gamble from 9:30 to 10:00 p.m. each Friday. For two or three years prior thereto, Station WFBR had been broadcasting a recruiting program for the Maryland National [fol. 434d] Guard at the special request of Major General Milton A. Reckord, Commanding General of the 29th Division stationed at Ft. Meade. This program was broadcast every Friday from 9:45 to 10:00 p.m. Baltimore Radio Show, Inc. advised the National Brodacasting Company, Inc. that as it considered the National Guard program to be more in the public interest than the Proctor & Gamble program and as the schedules for the programs conflicted, the station would be unable to broadcast the Proctor & Gamble commercial program. I received a letter in reply from Mr. William S. Hedges, vice president of the National Broadcasting Company, Inc., stating that our scheduling of the National Guard program was "grossly unfair" in that the licensee had scheduled it in network option time, complaining of the lack of cooperation rendered by the licensee to the network, and threatening to shift Station WFBR from the profitable Red network with which it had been affiliated since 1931 to the Blue network. This letter from Mr. Hedges reads as follows:

"January 25, 1940.

Mr. Hope H. Barroll, Jr., General Manager, Radio Station WFBR, Baltimore, Maryland.

DEAR HOPE:

Commercial Traffic has given me a copy of your wire in which you refuse to accept P&G Friday 9:30-10:00. If the Maryland National Guard program is of such transcendent importance, why don't you use your own time for it? That was the reason why time of affiliates was divided between network optional time and station time. We have always been willing to step aside for important local broadcasts which come up from time to time, but I think it is grossly unfair for you to set up a permanent schedule in network optional time for something which you should handle in your own station time.

[fol. 434e] I must say that I have not been at all happy with the degree of cooperation which you have extended to

NBC during the recent months. It can lead to only one conclusion, and that is that you are not happy as a member of the Red network. Maybe we can do something about that, too.

Sincerely yours, (S.) Bill. William S. Hedges."

On February 15, 1940, I replied to Mr. Hedges' letter and attach hereto as Exhibit "A" a copy of my reply.

The position taken by the National Broadcasting Company, Inc. resulted in the license of Station WFBR moving the National Guard program to a less desirable period. This shift meant a loss of a great part of the audience which had become accustomed to listening to this program from 9:45 to 10:00 p. m. The Proctor & Gamble program is the same program which previously had been scheduled for the period from 7:00 to 7:30 p. m. on Saturdays. The Baltimore Radio Show, Inc. had not been able to clear this time due to the fact that another sustaining program concerning the City Health Department had used that spot for several years. The offer of the licensee of Station WFBR to record the Proctor & Gamble program and broadcast it at another time proved unsatisfactory to the sponsor and the order was cancelled. The program was then placed on Station WBAL in Baltimore and was broadcast by that station until the decision of the sponsor to shift the program from Saturday to Friday.

If Regulation 3.105 had been in effect when the Proctor & Gamble program was offered to Station WFBR, the licensee would have been able to reject the Proctor & Gamble program and to continue to broadcast the National Guard program during its regular period. This regulation, in effect, provides that no contract between a network and its affiliates shall contain a provision preventing the affiliate from substituting a program of outstanding local import- [fol. 434f] ance for a network commercial program. Moreover, Regulation 3.104 limits the amount of option time that a national network company may have on an affiliate station, so that, in any event, a reasonable amount of time in each part of the day will remain free from network options and from any obligation thereunder.

5. *Loss of Red Network Affiliation by Station WFBR.* By reason of the operation of two networks by National Broadcasting Company, Inc., that company is in a position

to exert pressure, and does exert pressure, upon affiliates to comply with its demands under threat of being shifted from one of its networks to the other. In 1940 I learned that National Broadcasting Company, Inc. contemplated shifting Station WBAL, the regular Blue network outlet in Baltimore, to the Red network and Station WFBR to the Blue network. Shortly thereafter I had a conference with Mr. Trammell, president of National Broadcasting Company, Inc., in New York, at which conference were also present Mr. Phillip G. Loucks, one of my attorneys, and Mr. Harold Batchelder, my associate. Mr. Trammell notified us at this conference that National Broadcasting Company, Inc. had concluded arrangements to shift Station WBAL in Baltimore to the Red network as of October 1, 1941, thus requiring Station WFBR to move to the Blue network. Mr. Trammell offered to permit Station WFBR to become a basic Blue network outlet with a network rate of $300.00 per hour, which was the network rate that the licensee of Station WFBR had requested National Broadcasting Company, Inc. to charge for the station for some time. The local rate of Station WFBR had been $300.00 per hour for several years while the network rate had been $260.00. Further, National Broadcasting Company, Inc., through its president, Mr. Trammell, offered to guarantee that the compensation from National Broadcasting Company, Inc. to the Baltimore Radio Show, Inc. would be $125,000 for the first year, $100,000 for the second year and the third [fol. 434g] year guarantee would be negotiated. This offer of guaranty in connection with the Blue network, whereas there had never been any guaranty or offer of one in connection with the Red network, was confirmed in writing by Mr. Trammell. Upon information and belief, this guaranty was made for the purpose of preventing the affiliation of Station WFBR with the Mutual Broadcasting System, Inc.

6. *Irreparable Injury to Station WFBR.* The granting of plaintiffs' motions for a preliminary injunction would cause irreparable injury to the licensee of Station WFBR. Due to the limitation in the number of full time broadcast stations rendering adequate coverage, Mutual Broadcasting System, Inc. finds it necessary in 27 cities, many of which are important markets, to transmit its network programs to a station also used by one of the other national network

companies. These stations have granted options on all or most of their desirable hours to National Broadcasting Company, Inc. or to Columbia Broadcasting System, Inc. The exercise of such options by competitive networks during periods when commercial programs of Mutual Broadcasting System, Inc., are being broadcast results either in the enforced transcribing of the Mutual programs and their broadcast at a later time or on another day or, if the advertisers are not satisfied with the presentation of their programs through recordings, the advertisers discontinue the use of the Mutual network. Similarly, many advertisers are unwilling to consider the use of the Mutual network either because of its inability to reach many important markets or ifs inability to assure the continued availability of the time of its affiliated stations to advertisers during the periods of time covered by their respective contracts.

The Ballantine Ale program, referred to in Mr. Weber's affidavit, is an outstanding commercial program and has been broadcast by Station WFBR since its affiliation with [fol. 4 h] the Mutual network. However, due to the exercise by National Broadcasting Company, Inc. of its options on broadcasting time of its affiliates carrying this program, which options were exercised in order to schedule a commercial program for Canada Dry Ginger Ale, a competitive beverage, the J. Walter Thompson Company, advertising agent for the Ballantine Ale program, gave notice of cancellation of the program, effective December 5, 1941. The licensee's time charges on Station WFBR for broadcasting the Ballantine Ale program during the remainder of the period covered by the contract would have amounted to $4,095.00 and the net return to the Baltimore Radio Show, Inc., if the program had not been cancelled, would have been $2,869.89.

At the present time Station WFBR broadcasts 17½ hours of Mutual commercial programs a week, and 11½ hours of the total are carried during the periods that National Broadcasting Company, Inc. has the right to exercise options on the broadcasting time of its affiliates. The contracts calling for the broadcasting of Mutual commercial programs on Station WFBR are cancellable at the end of any 13-week cycle upon four weeks' notice. As of November 1, 1941, the licensee's time charges on Station WFBR

for Mutual commercial programs presently arranged for amount to $96,787.86, and the licensee's time charges for such programs broadcast during the periods that National Broadcasting Company, Inc. has contracted for network option time of affiliates total $67,854.36. The net return to Baltimore Radio Show, Inc. on the former sum would be $67,831.38 and on the latter sum $47,554.05. A stay of the Commission's regulations will not only cause irreparable injury to the licensee of Station WFBR so far as future network business is concerned, but also will seriously jeopardize the receipt by Baltimore Radio Show, Inc. of the above-stated sum of $47,554.05 on existing network business.

It is my information and belief that the situation with respect to irreparable injury to the licensee of Station [fol. 434i] WFBR resulting from a stay of the Commission's regulations applies equally to other affiliates of Mutual Broadcasting System, Inc., although, due to differences in rates charged advertisers by such other licensees and the number of network commercial programs broadcast, the extent of the irreparable injury in some instances will be less, and in other instances, greater than that which will be sustained by the licensee of Station WFBR.

Hope H. Barroll, Jr.

Subscribed and sworn to before me this 11th day of December, 1941. Miriam Koontz, Notary Public. My commission expires February 14, 1946. (Seal.)

[fol. 434j] EXHIBIT "A"

"February 15, 1940.

Mr. William S. Hedges, Vice President, National Broadcasting Company, RCA Building, New York City.

DEAR BILL:

Mr. Batchelder [Vice President and Treasurer of our station] and I have just completed arrangements to move into our time the program of the Maryland National Guard, in order to clear the time from 9:30 to 10:00 P. M. on Fridays to carry the Procter & Gamble "What's My Name" program during this period. The Maryland National

Guard program is an important local sustaining program devoted to recruiting activities which we have been carrying from 9:45 to 10:00 P. M. Fridays and it has been difficult for us to arrange for the shift to other time. However, since the period involved falls within time optioned for network programs we have arranged to clear it, effective March 1, in order to comply with the terms of our agreement with you.

The Procter & Gamble program is the same program which was at one time scheduled for the period from 7:00 to 7:30 P. M., Saturdays, which time we found impossible to clear at the time due to the program of the City Health Department, another sustaining program of great local importance and one which has been on our station for several years. You will recall that we offered to record this program and broadcast it at another time but the sponsor decided not to use this delayed broadcast and you cancelled the order. The program was then placed on WBAL which apparently proved satisfactory to all concerned until this recent decision to shift the program from Saturdays to Fridays. And, as I said before, we have arranged to clear this time on Fridays in order to make this time available.

I am reviewing and explaining this situation because of the implication contained in the last paragraph of your letter of January 25 relating to the same general subject. It is not our desire to be non-cooperative, but I hasten to point out that both the City Health and National Guard programs are old programs on our station which we regard [fol. 434k] as important public services and both are eager to keep the times assigned to them. Both were assigned to their present periods when these periods were unused by your company. Their reluctance to give up these periods must be readily understood under the circumstances. However, you have a right to the time under the contract and in recognition of that right we have arranged to shift the National Guard program thus making the time available on March 1—the date the Oxydol program is to start.

We did not carry the Pot O' Gold program which you offered for reasons which we made clear to you at the time. While we were advised by our lawyers that they might be able to defend us successfully if the program were ever questioned, we did not feel that we wanted to undertake the risk of making such a defense for a program which we considered to be of doubtful public interest. However, you

will recall that even with these doubts, we expressed a willingness to carry the program on condition that your company would undertake any risks that might be involved. But no useful purpose can be served by going back over this history now, except to say that we felt then and still feel that we were within our rights in not broadcasting this particular program.

If you will examine the relationship which has existed for some years between your Company and WFBR, you will find that WFBR has been very cooperative and we ask that you take this fact into consideration before making such statements as those contained in your letter of January 25.

Yours sincerely, (S.) Hope H. Barroll, Jr., Executive Vice President."

[fol. 435] In United States District Court, Southern District of New York

[Title omitted]

Reply Affidavit of Frank Stanton

United States of America,
Southern District of New York,
City, County and State of New York, ss.:

Frank Stanton, being duly sworn, deposes and says:

I am the Director of Research of Columbia Broadcasting System, Inc. (hereinafter sometimes called "CBS" or "Columbia") and I have been its Director of Research since November, 1938. I am also a member of the Advisory Board of the Office of Radio Research of Columbia University. I am fully familiar with the records of the operations of Columbia and also, through available sources, with the records of operations of National Broadcasting Company, Inc. (hereinafter sometimes called "NBC") and of Mutual Broadcasting System, Inc. (hereinafter sometimes called "MBS" or "Mutual"). I am also familiar with records and statistical material and methods relating to program preferences of listeners and habits of radio listen-

ing. This affidavit is in reply to affidavits submitted herein by Mutual in opposition to the motion of Columbia for a temporary injunction.

1. Record of Sales of Network Time to Advertisers.

The Mutual Broadcasting System, which began its operations in the latter part of 1934 and which completed its first full year of operations in 1935, has shown a record of uninterruptedly expanding business during the subsequent years. The percentage increase of the gross sales of network time of Mutual compared with the percentage increase (or decrease) of gross sales of network time of CBS and the Red network and the Blue network of NBC, for each of the years 1936 to 1941, inclusive, compared in each case with the gross sales for the preceding year, is as follows:

[fol. 436] Percentage Increase (or Decrease) over Preceding Year of Gross Sales of Network Time

	MBS	CBS	Red	Blue
1936	53.1%	31.4%	16.1%	2.0%
1937	13.1	24.0	20.0	— 3.4
1938	30.4	—4.8	14.8	—10.5
1939	14.0	26.3	10.3	5.6
1940	43.1	18.8	12.8	9.4
1941	53.2	8.7	10.3	3.0
Average Increase 1936-1941	34.5%	17.4%	14.1%	1.0%

A table showing the percentage changes in the gross sales of network time for each month during this period is attached hereto as Exhibit A.

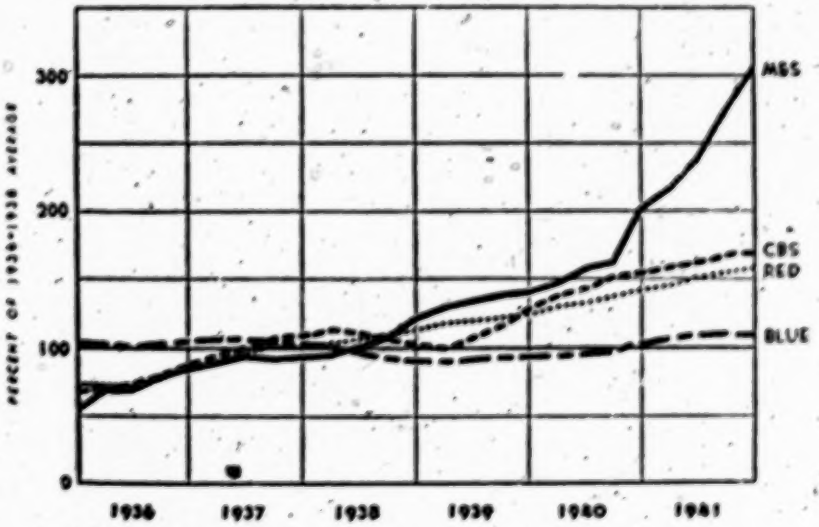
The growth of the business of Mutual compared to that of CBS and NBC is also shown by the following chart which plots the trend of gross sales of network time for Mutual compared with that of CBS and of the Red network and the Blue network of NBC.

Trend of Gross Sales of Network Time
MBS Compared with CBS, NBC-Red and NBC-Blue

Based on Preceding 12 Months' Sales at Each Plotted Month

Index: 3-Year Average, 1936-38=100%

Separately for MBS, CBS, NBC-Red and NBC-Blue



[fol. 437] The supporting tables for this chart are annexed hereto as Exhibits B, C, D, E, F, G, H and I.

The record of gross sales of network time for the years 1935 to 1941, inclusive (expressed to the nearest thousand), is as follows:

Gross Sales of Network Time
(Expressed in Thousands of Dollars)

			NBC	
	MBS	CBS	Red	Blue
1935	$1,293	$17,638	$19,499	$11,650
1936	1,979	23,168	22,646	11,878
1937	2,239	28,722	27,172	11,479
1938	2,920	27,345	31,187	10,275
1939	3,330	34,540	34,399	10,846
1940	4,767	41,026	38,800	11,863
1941	7,301	44,584	42,777	12,223

Annexed hereto as Exhibits J, K, L and M are supporting tables showing gross sales of network time for each month during this period.

Since 1935 Mutual's gross sales, expressed in percentage of gross sales of CBS and in percentage of gross sales of NBC, have greatly increased and now amount to more than twice Mutual's sales in 1935 in relation to the other networks. The record for each period is as follows:

Mutual Broadcasting System Gross Sales of Network Time Expressed as Percentage of Gross Sales

		Of NBC	
	Of CBS	Red	Blue
1935	7.3%	6.6%	11.1%
1936	8.5	8.7	16.7
1937	7.8	8.2	19.5
1938	10.7	9.4	28.4
1939	121	116	
1940	11.6	12.3	40.2
1941	16.4	17.1	59.7

From the foregoing tables and chart it is apparent that Mutual has been able to compete successfully with the other networks and this is particularly true in the case of [fol. 438] the Blue network of NBC. Mutual has been able to increase its sales from one-ninth of the Blue sales in 1935 to more than one-half of the Blue sales in 1941.

2. Number of Mutual's Affiliated Stations.

Since 1935 the number of stations affiliated with the Mutual network and regularly offered by Mutual as network outlets for advertisers has shown a steady increase each year. The number of stations so affiliated and the number affiliated with Columbia (as reported by "Radio Advertising Rates and Data" published by Standard Rate & Data Service) have been at the end of each of the years 1935 to 1940, inclusive, and at November, 1941, as follows:

	Number of affiliated stations	
	MBS*	CBS
1935	5	98
1936	32	100
1937	77	109
1938	121	116
1939	121	116
1940	147	120
1941 (November)	178	121

* The number of stations affiliated with Mutual, as reported by the Standard Rate and Data Service, varies somewhat from the number reported by Mutual, itself. In Mutual's "Network News Weekly" for the week of December 28, 1941, Mutual reports that it has 193 stations on its network and states:

"Mutual now has 25 more stations than it had associated with it — year ago. In December, 1940, 168 stations were connected with the network. In 1939 there were 118. The network began in 1934 with four stations.

"1941 saw three of the nation's pioneer stations, WGR, Buffalo, WFBR, Baltimore, and WCAE, Pittsburgh, all 22 years old, each possessing 5,000 watts power, switch to Mutual.

"For the first time, Mutual programs were regularly heard in Florida when five outlets there joined the network.

"The total number of affiliate stations which belong to the cooperative Mutual network is now 193."

[fol. 439]

On account of expiration of affiliation contracts, each station affiliated with Columbia in 1935 has been free, one or more times during the period of Mutual's operations, to leave the CBS network and join any other network offering it a more attractive affiliation.

Frank Stanton.

Subscribed and sworn to before me this 10th day of January, 1942. George A. Burwell, Notary Public. N. Y. Co. Clk's No. 527, Reg. No. 3B800; Kings Co. Clk's No. 119, Reg. No. 3459; Bronx Co. Clk's No. 62, Reg. No. 248B43; Queens Co. Clk's No. 2167, Reg. No. 8330. Certificates filed in Westchester and Richmond Counties. Commission Expires March 30, 1943. (Notarial Seal.)

[Col. 440]

EXHIBIT "A" TO REPLY AFFIDAVIT OF FRANK STANTON

Trend of Gross Sales of Network Time, Shown by Per cent Change, Each Month, from Same Month of Preceding Year
MBS Compared with CBS, NBC-Red, and NBC-Blue
1936–1941

Month	1936 MBS	1936 CBS	1936 NBC Red	1936 NBC Blue	1937 MBS	1937 CBS	1937 NBC Red	1937 NBC Blue	1938 MBS	1938 CBS	1938 NBC Red	1938 NBC Blue
	%	%	%	%	%	%	%	%	%	%	%	%
January	+143.1	+ 7.5	− 5.3	−10.8	+35.4	+25.1	+37.7	+21.9	+25.2	+21.1	+10.9	− 0.7
February	+143.8	+15.4	− 0.9	− 2.7	+43.2	+18.6	+33.9	+ 0.5	+10.3	+18.4	+10.2	− 3.0
March	+103.2	+18.7	+ 1.9	− 2.0	+29.3	+17.9	+32.2	− 3.6	− 5.7	+18.5	+ 8.1	− 1.2
April	+ 18.6	+20.8	+ 6.1	− 4.1	+42.9	+31.4	+30.8	− 0.6	− 5.0	− 5.4	+ 6.7	−12.5
May	+ 17.1	+36.0	− 1.6	− 9.5	+19.2	+46.3	+37.0	+ 4.5	+25.2	− 4.6	+16.2	−17.5
June	+ 15.4	+40.9	− 1.3	− 4.5	+11.4	+64.8	+48.3	− 4.7	+72.6	−14.4	+15.4	−18.0
July	+ 74.6	+42.1	+14.7	+ 1.7	− 7.3	+53.8	+25.2	−15.7	+63.7	−31.2	+17.7	−15.7
August	+ 69.4	+40.3	+22.8	+14.8	−20.5	+58.6	+84.7	−20.5	+70.1	−27.2	+13.1	−17.1
September	+103.6	+69.2	+55.1	+ 1.6	−21.3	+10.3	+ 3.3	−11.2	+50.4	−21.0	+16.5	−26.6
October	+ 51.1	+42.7	+33.2	+32.7	−12.1	− 9.1	− 8.1	−12.7	+45.6	− 4.7	+25.9	−12.7
November	+ 31.8	+41.1	+45.1	+ 6.4	+13.2	+ 9.2	− 4.9	+ 3.0	+39.9	− 7.6	+25.7	− 6.5
December	+ 10.3	+29.0	+33.8	+ 5.0	+26.9	+14.5	+ 4.8	− 3.2	+37.6	− 9.3	+12.5	− 6.3
Total	+ 53.1	+31.4	+16.1	+ 2.0	+13.1	+24.0	+20.0	− 3.4	+30.4	− 4.8	+14.8	−10.5

Example: In January 1936, gross time sales of the Mutual Broadcasting System were 143.1% above January 1935, while sales of CBS increased 7.5%, NBC-Red decreased 5.3% and NBC-Blue decreased 10.8%.

EXHIBIT A (Continued)

Month	1939 MBS %	1939 CBS %	1939 NBC Red %	1939 NBC Blue %	1940 MBS %	1940 CBS %	1940 NBC Red %	1940 NBC Blue %	1941 MBS %	1941 CBS %	1941 NBC Red %	1941 NBC Blue %
January	+17.5	− 7.2	+11.3	− 4.9	+ 1.0	+33.7	+13.7	− 2.8	+ 58.9	+ 9.3	+ 7.5	+10.2
February	+ 8.2	− 5.1	+ 9.5	+ 1.3	+22.0	+31.0	+13.0	+ 2.7	+ 30.8	+ 5.2	+ 2.0	+ 9.5
March	+31.8	− 3.6	+11.8	+ 3.8	+27.4	+20.1	+ 4.0	+ 1.0	+ 31.5	+11.2	+11.7	+ 5.6
April	+38.4	+17.7	+ 8.5	+ 4.8	+38.0	+16.4	+12.2	+17.4	+ 24.0	+17.1	+15.7	− 8.6
May	+21.1	+26.8	+ 7.7	+11.0	+37.0	+15.3	+10.0	+ 5.7	+ 54.3	+ 7.1	+ 7.7	+ 2.1
June	+12.9	+34.8	+ 0.9	+24.5	+31.1	+ 9.9	+ 9.7	+ 1.3	+ 78.3	+17.9	+16.8	+ 9.1
July	+29.9	+69.0	+ 8.1	+22.6	+ 8.3	+32.8	+20.8	+ 1.7	+130.2	+13.9	+10.5	+10.6
August	+24.2	+64.5	+10.5	+21.5	+11.2	+22.8	+16.5	− 0.9	+139.9	+18.7	+ 7.6	+16.1
September	+ 5.5	+60.0	+ 9.2	+19.9	+34.1	+21.3	+17.6	+15.0	+ 78.8	+13.4	+ 9.4	− 1.4
October	+23.0	+41.1	+17.6	− 5.0	+83.4	+18.8	+13.8	+40.1	+ 7.0	− 2.5	+ 2.0	−15.0
November	− 8.4	+41.6	+13.2	− 4.2	+92.0	+ 6.2	+10.2	+13.4	+ 52.7	+ 0.5	+16.3*	+ 3.5*
December	− 5.6	+39.5	+13.5	+ 0.7	+81.4	+ 8.2	+13.9	+17.4	+ 64.3	− 1.3	+16.2*	+ 3.5*
Total	+14.0	+26.3	+10.3	+ 5.6	+43.1	+18.8	+12.8	+ 9.4	+ 53.2	+ 8.7	+10.3	+ 3.0

* November and December 1941 estimated for these networks from published information.

Sources: CBS Research Department Records for CBS; Publishers Information Bureau for MBS and NBC.

PUBLISHERS' INFORMATION BUREAU, INC., 31 East 10th Street, New York, New York

Publishers' Information Bureau (PIB) was founded in 1915 to provide advertising expenditure records for the leading national magazines and farm papers. In 1933, this service also began to publish monthly figures for advertisers' gross expenditures for network time. This organization checks all advertising insertions in 103 magazines, 42 farm papers, and all nationwide network broadcasting. It offers the only service of its kind and is the recognized source for expenditure figures in the fields of national magazines, farm papers and network radio. Forty of the leading advertising agencies subscribe to these reports and make the collection of these data feasible.

EXHIBIT "B" TO REPLY AFFIDAVIT OF FRANK STANTON

Mutual Broadcasting System

Trend of Gross Sales of Network Time, as shown by

12 Months Sales Ending at Month Indicated

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	—	$1,386	$2,035	$2,293	$2,968	$3,332	$4,955
February	—	1,481	2,105	2,316	2,989	3,393	5,059
March	—	1,579	2,161	2,302	3,063	3,477	5,182
April	—	1,600	2,221	2,291	3,136	3,578	5,269
May	—	1,619	2,246	2,331	3,177	3,666	5,444
June	—	1,633	2,259	2,416	3,202	3,731	5,677
July	—	1,680	2,251	2,481	3,253	3,755	5,983
August	—	1,730	2,225	2,549	3,293	3,778	6,302
September	—	1,816	2,189	2,617	3,303	3,851	6,524
October	—	1,907	2,156	2,726	3,383	4,207	6,579
November	—	1,961	2,187	2,828	3,349	4,508	6,910
December	$1,293	1,979	2,239	2,920	3,330	4,767	7,301

Source: Publishers Information Bureau

EXHIBIT "C" TO REPLY AFFIDAVIT OF FRANK STANTON

Columbia Broadcasting System

Trend of Gross Sales of Network Time, as shown by

12 Months Sales Ending at Month Indicated

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	—	$17,770	$23,646	$29,223	$27,139	$35,442	$41,359
February	—	18,025	24,001	29,639	27,001	36,231	41,531
March	—	18,367	24,388	30,114	26,892	36,818	41,947
April	—	18,703	25,001	29,975	27,322	37,287	42,516
May	—	19,165	25,812	29,856	27,977	37,760	42,770
June	—	19,601	26,786	29,501	28,716	38,044	43,333
July	—	19,983	27,481	28,880	29,660	38,804	43,760
August	—	20,337	28,204	28,349	30,578	39,338	44,300
September	—	21,089	28,394	27,922	31,540	39,884	44,717
October	—	21,913	28,144	27,804	32,519	40,519	44,614
November	—	22,621	28,369	27,603	33,540	40,735	44,633
December	$17,638	23,168	28,722	27,345	34,540	41,026	44,584

Source: CBS Research Department.

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EXHIBIT "D" TO REPLY AFFIDAVIT OF FRANK STANTON

National Broadcasting Co.—Red Network

Trend of Gross Sales of Network Time, as shown by

12 Months Sales Ending at Month Indicated

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	—	$19,402	$23,295	$27,432	$31,485	$34,801	$39,049
February	—	19,386	23,871	27,665	31,772	35,157	39,113
March	—	19,421	24,487	27,870	32,045	35,279	39,485
April	—	19,524	25,029	28,025	32,254	35,605	39,955
May	—	19,497	25,641	28,391	32,456	35,888	40,196
June	—	19,478	26,379	28,732	32,478	36,137	40,670
July	—	19,685	26,765	29,091	32,672	36,672	40,997
August	—	19,974	27,306	29,364	32,920	37,104	41,230
September	—	20,683	27,370	29,704	33,141	37,563	41,518
October	—	21,286	27,175	30,280	33,645	38,018	41,594
November	—	22,035	27,056	30,870	34,014	38,351	42,178*
December	$19,499	22,646	27,172	31,187	34,399	38,800	42,777*

Source: Publishers Information Bureau.

*November and December, 1941, monthly gross sales estimated.

EXHIBIT "E" TO REPLY AFFIDAVIT OF FRANK STANTON,

National Broadcasting Co.—Blue Network

Trend of Gross Sales of Network Time, as shown by

12 Months Sales Ending at Month Indicated

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	—	$11,534	$12,089	$11,471	$10,218	$10,814	$11,971
February	—	11,506	12,094	11,440	10,232	10,842	12,070
March	—	11,483	12,055	11,427	10,273	10,853	12,133
April	—	11,440	12,049	11,305	10,314	11,008	12,043
May	—	11,344	12,091	11,138	10,400	11,058	12,062
June	—	11,305	12,052	10,995	10,559	11,058	12,137
July	—	11,319	11,923	10,888	10,691	11,081	12,236
August	—	11,431	11,745	10,770	10,814	11,074	12,347
September	—	11,446	11,645	10,559	10,929	11,179	12,336
October	—	11,760	11,483	10,417	10,881	11,551	12,141
November	—	11,824	11,515	10,345	10,838	11,682	12,180*
December	$11,650	11,878	11,479	10,275	10,846	11,863	12,223*

Source: Publishers Information Bureau.

*November and December, 1941, monthly gross sales estimated.

[fol. 444] EXHIBIT "F" TO REPLY AFFIDAVIT OF FRANK STANTON

Mutual Broadcasting System

Trend to Gross Sales of Network Time for 12 Months

Ending with Each Month Indicated

Index: 3 Year Average 1936-1938 = 100%

Month	1935	1936	1937	1938	1939	1940	1941
January	—	58.2%	85.5%	96.4%	124.7%	140.0%	208.2%
February	—	62.2	88.5	97.3	125.6	142.6	212.6
March	—	66.4	90.8	96.7	128.7	146.1	217.8
April	—	67.2	93.4	96.3	131.8	150.4	221.4
May	—	68.0	94.4	97.9	133.5	154.0	228.8
June	—	68.6	94.9	101.5	134.6	157.0	238.6
July	—	70.6	94.6	104.3	136.7	157.8	251.4
August	—	72.7	93.5	107.1	138.4	158.8	264.8
September	—	76.3	92.0	110.0	138.8	161.8	274.1
October	—	80.1	90.6	114.6	142.2	176.8	276.5
November	—	82.4	91.9	118.8	140.7	189.4	290.3
December	54.3%	83.2	94.1	122.7	139.9	200.3	306.8

*Average 12 month total of gross sales for years 1936, 1937, 1938 = $2,379,573. The 12 months' total of gross sales ending with each month above, is then expressed as a percent of this average.

EXHIBIT "G" TO REPLY AFFIDAVIT OF FRANK STANTON

Columbia Broadcasting System

Trend of Gross Sales of Network Time for 12 Months

Ending with Each Month Indicated

Index: 3 Year Average 1936-1938 = 00%

Month	1935	1936	1937	1938	1939	1940	1941
January	—	67.3%	89.5%	110.6%	102.8%	134.2%	156.6%
February	—	68.2	90.9	112.2	102.2	137.2	157.2
March	—	69.5	92.3	114.0	101.8	139.4	158.8
April	—	70.8	94.7	113.5	103.4	141.2	161.0
May	—	72.6	97.7	113.0	105.9	143.0	161.9
June	—	74.2	101.4	111.7	108.7	144.0	164.1
July	—	75.7	104.0	109.3	112.3	146.9	165.7
August	—	77.0	106.8	107.3	115.8	148.9	167.7
September	—	79.8	107.5	105.7	119.4	151.0	169.3
October	—	83.0	106.6	105.3	123.1	153.4	168.9
November	—	85.6	107.4	104.5	127.0	154.2	169.0
December	66.8%	87.7	108.7	103.5	130.8	155.3	168.8

Average 12 month total of gross sales for years 1936, 1937, 1938 = $26,411,887. The 12 months' total of gross sales ending with each month above, is then expressed as a percent of this average.

[R 445] EXHIBIT "H" TO REPLY AFFIDAVIT OF FRANK STANTON

National Broadcasting Co.—Red Network

Trend of Gross Sales of Network Time for 12 Months Ending with Each Month Indicated

Index: 3 Year Average 1936-1938=100%*

Month	1935	1936	1937	1938	1939	1940	1941
January	—	71.9%	86.3%	101.6%	116.6%	128.9%	144.6%
February	—	71.8	88.4	102.5	117.5	130.2	144.9
March	—	71.9	90.7	103.2	118.7	130.7	146.2
April	—	72.3	92.7	103.8	119.5	131.9	148.0
May	—	72.2	95.0	105.1	120.2	132.9	148.9
June	—	72.1	97.6	160.4	120.3	133.8	150.6
July	—	72.9	99.1	107.7	121.0	135.8	151.8
August	—	74.0	101.1	108.7	121.9	137.4	152.7
September	—	76.6	101.4	110.0	122.7	139.1	153.8
October	—	78.8	100.6	112.1	124.6	140.8	154.0
November	—	81.6	100.2	114.3	126.0	142.0	156.2**
December	72.2%	83.9	100.6	115.5	127.4	143.7	158.4**

* Average 12 months total of gross sales for years 1936, 1937, 1938—$27,001,566. The 12 months' total of gross sales ending with each month above is then expressed as a percent of this average.

** November and December 1941, based on estimated monthly gross sales for that portion of the 12-month period.

EXHIBIT "I" TO REPLY AFFIDAVIT OF FRANK STANTON

National Broadcasting Co.—Blue Network

Trend of Gross Sales of Network Time for 12 Months Ending with Each Month Indicated

Index: 3 Year Average 1936-1938=100%*

Month	1935	1936	1937	1938	1939	1940	1941
January	—	102.9%	107.8%	102.3%	91.1%	96.5%	106.8%
February	—	102.6	107.9	102.0	91.3	96.7	107.7
March	—	102.4	107.5	101.9	91.6	96.8	108.2
April	—	102.0	107.5	100.8	92.0	98.2	107.4
May	—	101.2	107.8	99.3	92.8	98.6	107.6
June	—	100.8	107.5	98.1	94.2	98.7	108.3
July	—	101.0	106.4	97.1	95.4	98.8	109.1
August	—	102.0	104.8	96.1	96.5	98.8	110.1
September	—	102.1	103.9	94.2	97.5	99.7	110.0
October	—	104.9	102.4	92.9	97.1	103.0	108.3
November	—	105.5	102.7	92.3	96.7	104.2	108.6**
December	103.9%	105.9	102.4	91.7	96.7	105.8	109.0**

* Average 12 month total of gross sales for year 1936, 1937, 1938—$11,211,071. The 12 months' total of gross sales ending with each month above, is then expressed as a percent of this average.

** November and December 1941, based on estimated monthly gross sales for that portion of the 12-month period.

[fol. 449] EXHIBIT "J" TO REPLY AFFIDAVIT OF FRANK STANTON

Mutual Broadcasting System

Gross Sales of Network Time, Excluding Cost of Talent
1935–1941

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	$65	$158	$214	$268	$315	$318	$3[illegible]
February	67	162	232	256	277	338	4[illegible]
March	94	191	247	233	307	391	5[illegible]
April	118	140	200	190	263	363	4[illegible]
May	111	130	155	194	235	322	4[illegible]
June	91	105	117	202	228	299	3[illegible]
July	63	110	102	167	217	235	3[illegible]
August	72	122	97	165	205	228	3[illegible]
September	83	169	133	200	211	283	3[illegible]
October	180	272	239	348	428	785	6[illegible]
November	173	228	258	361	327	528	5[illegible]
December	175	193	245	337	318	577	5[illegible]
Total	$1,293	$1,979	$2,239	$2,920	$3,330	$4,767	$7 3[illegible]

Source: Publishers Information Bureau.

EXHIBIT "K" TO REPLY AFFIDAVIT OF FRANK STANTON

Columbia Broadcasting System

Gross Sales of Network Time, Excluding Cost of Talent
1935–1941

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	$1,769	$1,901	$2,379	$2,880	$2,674	$3,576	$3 [illegible]
February	1,654	1,909	2,264	2,680	2,542	3,331	3,5[illegible]
March	1,830	2,172	2,560	3,034	2,926	3,513	3,9[illegible]
April	1,615	1,951	2,563	2,424	2,854	3,323	3,6[illegible]
May	1,287	1,750	2,561	2,442	3,097	3,571	3,9[illegible]
June	1,067	1,503	2,477	2,121	2,860	3,144	3,7[illegible]
July	910	1,294	1,988	1,368	2,312	3,071	3,4[illegible]
August	879	1,233	1,955	1,424	2,342	2,876	3,4[illegible]
September	1,087	1,839	2,029	1,602	2,563	3,110	3,5[illegible]
October	1,931	2,755	2,505	2,387	3,367	4,001	3,9[illegible]
November	1,722	2,430	2,654	2,453	3,474	3,690	3,7[illegible]
December	1,886	2,433	2,787	2,529	3,529	3,820	3,7[illegible]
Total	$17,638	$23,168	$28,722	$27,345	$34,540	$41,026	$44 [illegible]

Source: CBS Research Department Records.

[fol. 447] EXHIBIT "L" TO REPLY AFFIDAVIT OF FRANK STANTON

National Broadcasting Co.—Red Network

Gross Sales of Network Time, Excluding Cost of Talent
1935–1941

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	$1,822	$1,725	$2,375	$2,635	$2,932	$3,335	$3,584
February	1,714	1,698	2,274	2,507	2,744	3,100	3,164
March	1,879	1,915	2,531	2,736	3,060	3,182	3,554
April	1,660	1,762	2,304	2,458	2,668	2,993	3,463
May	1,677	1,650	2,261	2,628	2,829	3,112	3,353
June	1,509	1,490	2,209	2,550	2,572	2,821	3,295
July	1,406	1,613	2,019	2,377	2,571	3,106	3,433
August	1,265	1,554	2,094	2,368	2,617	3,049	3,282
September	1,285	1,993	2,058	2,397	2,618	3,077	3,366
October	1,815	2,418	2,223	2,799	3,292	3,747	3,822
November	1,659	2,408	2,289	2,878	3,257	3,590	4,174*
December	1,808	2,419	2,535	2,853	3,238	3,687	4,286*
Total	$19,499	$22,646	$27,172	$31,187	$34,399	$38,800	$42,777

Source: Publishers Information Bureau.
* November and December estimated.

EXHIBIT "M" TO REPLY AFFIDAVIT OF FRANK STANTON

National Broadcasting Co.—Blue Network

Gross Sales of Network Time, Excluding Cost of Talent
1935–1941

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	$1,073	$957	$1,167	$1,159	$1,102	$1,070	$1,179
February	1,045	1,017	1,022	991	1,004	1,032	1,130
March	1,146	1,123	1,083	1,070	1,111	1,122	1,185
April	1,022	980	974	852	893	1,048	958
May	1,008	912	953	786	873	922	941
June	872	833	794	651	810	821	896
July	803	817	689	581	713	725	824
August	757	869	691	573	696	689	800
September	879	893	793	582	698	802	791
October	964	1,279	1,117	975	927	1,299	1,104
November	996	1,060	1,092	1,021	978	1,109	1,148*
December	1,086	1,140	1,104	1,034	1,042	1,223	1,266*
Total	$11,650	$11,878	$11,479	$10,275	$10,846	$11,863	$12,223

Source: Publishers Information Bureau.
* November and December estimated.

[fol. 447a] In United States District Court, Southern District of New York

[Title omitted]

Affidavit of Frank Stanton

United States of America,
Southern District of New York,
City, County and State of New York, ss:

Frank Stanton, being duly sworn, deposes and says:

I am Director of Research of Columbia Broadcasting System, Inc. And I have been its Director of Research since November, 1938. I am fully familiar with available records relating to business aspects of the broadcasting industry, with the relative desirability of stations and networks as advertising media, and with the practice of the industry relating to the purchase and sale of broadcasting time of radio stations for advertising purposes.

Attached hereto and made part hereof is a copy of the December 1941 issue of "Radio Advertising Rates and Data" published by Standard Rate & Data Service. This publication, which is issued monthly, constitutes the most complete, up-to-date and accurate record available to the industry covering lists of radio stations and the power, frequency, commercial advertising rates and commercial policy of radio stations, and is universally used by advertisers, advertising agencies and others in map-ing radio [fol. 447b] advertising campaigns and in choosing stations and evaluating their relative desirability for advertising purposes.

Frank Stanton.

Subscribed and sworn to before me this 12th day of December, 1941. Margaret E. Landry, Notary Public, Westchester County. Certificate filed in N. Y. Co. Clk's No. 940. Reg. 2L573. Term expires March 30, 1942.

[fol. 448]

IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

APPEARANCE OF FEDERAL COMMUNICATIONS COMMISSION

In accordance with the provisions of the Act of October 22, 1943 (38 Stat. 219) as extended by Section 402(a) of the Communications Act of 1934, as amended, the Federal Communications Commission hereby enters its appearance as a party defendant, and the appearance of its counsel in the above-entitled matter.

By filing this Appearance the Commission does not concede the jurisdiction of the Court of this case.

Federal Communications Commission, by Telford Taylor, General Counsel. Thomas E. Harris, Assistant General Counsel.

AFFIDAVIT OF SERVICE.

CITY OF WASHINGTON,
District of Columbia, ss:

TELFORD TAYLOR, being first duly sworn on oath, deposes and says that on this 1st day of November, 1941, he served copies of the foregoing Appearance of Federal Communications Commission by placing same in envelopes, postpaid and duly addressed to each of the following: John J. Burns, attorney for plaintiff, 40 Wall Street, New York, New York, The Honorable Francis Biddle, Attorney General of the United States of America, Department of Justice, Washington, D. C.; and The Honorable Mathias F. Correa, United States Attorney for the Southern District of New York, United States Courthouse, Foley Square, New York, New York, and by depositing same in the United States mail chute at the Benjamin Franklin Post Office, Washington, D. C.

Telford Taylor.

Subscribed to and sworn before me this 1st day of November, 1941. Stephen Tuby Jr., Notary Public. My Commission expires Oct. 14, 1943.

[fol. 449] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Upon the complaint herein and upon the annexed affidavit of Telford Taylor, verified the 5th day of November, 1941, and exhibit referred to therein and filed therewith, and upon all the other papers and proceedings heretofore filed and had herein, the defendants in the above-entitled cause move this Court to dismiss the complaint or, in the alternative, for summary judgment in their favor.

The grounds of the motions are:

1. The Court lacks jurisdiction of the subject matter of this action under the special statutory provisions referred to in the preamble to the complaint.

2. The complaint fails to state a claim upon which relief can be granted.

3. Even if the Court have jurisdiction of the subject matter of this action, the pleadings and other papers on file and the affidavit submitted on these motions and exhibit referred to therein and filed therewith show that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law.

Dated: Washington, D. C., November 7th, 1941.

(S.) Samuel Brodsky, Attorney for the United States of America, United States Court House, Foley Square, New York, N. Y. Telford Taylor, Thomas E. Harris, Attorneys for Federal Communications Commission, 7528 New Post Office Building, Washington, D. C.

[fol. 450] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF TELFORD TAYLOR

DISTRICT OF COLUMBIA, ss:

TELFORD TAYLOR, being duly sworn, says:

1. He is General Counsel of the Federal Communications Commission and as such is familiar with the Commission's

proceedings taken under Order No. 37, Docket No. 5060, and that the proceedings include the following:

(a) The Federal Communications Commission on March 18, 1938, by Order No. 37, authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity." On April 6, 1938, a committee of three Commissioners was appointed by the Commission to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission."

(b) Between November 14, 1938, and May 19, 1939, the committee held hearings pursuant to public notice that the Commission would hear any person or organization desiring to present evidence on the matters included for investigation in Commission Order No. 37. The committee requested the national networks, regional networks, station licensees, and transcription and recording companies to present evidence. It also requested information by question-aire from licensees of stations and from holders of stock in licensee corporations. In addition, persons and organizations requesting an opportunity to present evidence material to the investigation were given an opportunity to be heard. In all, the committee actually heard witnesses on 73 days during this 6-month period. Ninety-six witnesses were heard. Their evidence fills 8,713 pages of transcript. Seven hundred and seven exhibits were introduced. The testimony and exhibits fill 27 large volumes.

[fol. 451] (c) Twenty of the ninety-six witnesses were called by the National Broadcasting Co.; they testified for the equivalent of more than 24 hearing days. Their testimony fills 3,225 of the 8,713 pages of transcript. They introduced 227 of the 707 exhibits. The testimony of one National Broadcasting Company witness, David Sarnoff, president of the Radio Corporation of America and chairman of the Board of the National Broadcasting Company, fills 200 pages.

(d) Seventeen witnesses appeared on behalf of Columbia Broadcasting System. They testified for the equivalent of more than 16 hearing days. Their testimony fills 2,180 pages of the transcript and they introduced 186 exhibits.

The testimony of the president of the Columbia Broadcasting System fills 130 pages of the transcript.

(e) Eight witnesses for the Mutual Broadcasting System testified for the equivalent of more than 6 hearing days, filling 670 pages of the transcript and introducing 53 exhibits.

(f) On June 12, 1940, the committee issued its report based upon the evidence adduced at the hearings and the official records of the Commission.

(g) In November, 1940 briefs in the proceeding were filed on behalf of National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System and other interested parties. On December 2 and 3, 1940, oral arguments before the full Commission were presented by the parties. These arguments were directed to the committee report and to certain draft regulations issued for the purpose of giving scope and direction to the oral arguments. On January 2, 1941, supplementary briefs were filed on behalf of National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System in which were discussed the jurisdiction of the Commission with respect to matters covered by the committee report and the draft regulations, and in which attention was given to the actual and feasible limits of competition in the broadcasting field, with particular reference to network broadcasting.

(h) On May 2, 1941, the Commission issued its report setting forth its findings and conclusions in the proceeding, together with an order adopting eight regulations (Regu- [fol. 452] lations 3.101 to 3.108 inclusive) setting forth policies which the Commission would thereafter apply in exercising its licensing functions. Two of the seven Commissioners filed additional views dissenting from the action taken by the Commission. The effective date of the regulations was deferred for 90 days from the date of the order with respect to existing contracts, arrangements, or understandings, or network organization station licenses, and further provision was made for extension of the effective date of Regulation 3.106 in order to permit the orderly disposition of properties. On June 13, 1941, the Commission provided for the postponement for 90 days from May 2, 1941 of Regulation 3.107, and for further postponement of the effective date of that regulation in order to permit the orderly disposition of properties. On July 22, 1941, the

effective date of the regulations with respect to existing contracts, arrangements, or understandings, or network organization station licenses, or the maintenance of more than one network by a single network organization was again deferred until September 16, 1941, and on August 28, 1941, said effective date was postponed until after the disposition of the petition of the Mutual Broadcasting System to amend Regulations 3.103 and 3.104.

(i) On August 14, 1941, the Mutual Broadcasting System petitioned the Commission to amend two of the regulations, 3.103 and 3.104. Upon this petition the Commission called for briefs and oral argument by interested parties. Briefs were filed by National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System and by one regional network organization and oral argument was held before the Commission on September 12, 1941. Thereafter, on October 11, 1941, the Commission issued a Supplemental Report on Chain Broadcasting (two of the six Comissioners dissenting) together with amendments to three of the regulations (3.102, 3.103, and 3.104). The Commission simultaneously postponed the effective date of the regulations with respect to existing contracts, arrangements, or understandings, or network organization station licenses until November 15, 1941, and suspend the effective date of Regulation 3.107 indefinitely, with the provision that any subsequent order of the Commission placing Regulation 3.107 in effect should provide for not less than six months' notice and for further extension of its [fol. 453] effective date from time to time in order to permit the orderly disposition of properties.

(j) On October 31, 1941, the Commission issued its minute setting forth the procedure to be followed in applying the Chain Broadcasting Regulations. Said minute reads as follows:

"If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing.

In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the license thereupon conforms to the decision.

"The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106 relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

"The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations."

2. A certified copy of said proceedings before the Commission in connection with Order No. 37, Docket No. 5060, is filed herewith and incorporated herein by reference as Exhibit A.

[fol. 454] 3. Among the grounds urged by plaintiff in support of its contention that the action of the Commission promulgating the Chain Broadcasting Regulations is invalid are that:

"1. The Rules are unreasonable, arbitrary and destructive of plaintiff's business without legitimate reason.

"2. The Rules are not required by and do not serve the public interest, convenience and necessity.

"3. The Rules are not necessary to carry out the provisions or the purposes of the Communications Act of 1934.

"4. The Rules are in fact contrary to the public interest, convenience and necessity, and to the provisions and purposes of the Communications Act of 1934."

Affiant submits that Exhibit A is relevant on the above issues sought to be raised and that it shows that the regulations are not arbitrary and capricious but that they serve public interest, convenience or necessity and carry out the

provisions or purposes of the Communications Act, and that there is no genuine issue as to any material fact.

Telford Taylor.

Subscribed and Sworn before me this 5th day of November, 1941. Pansy E. Wiltshire, Notary Public. Comm.. Exp. 10/31/45.

In District Court of the United States for the Southern District of New York

[Title omitted]

Stipulation and Order Granting Temporary Suspension of Commission's Order

It is hereby stipulated by and between all the parties by their respective counsel:

1. That counsel for all parties will cooperate to bring on for hearing on or before December 15, 1941, the Motion for Preliminary Injunction heretofore filed by plaintiffs and the defendants' Motion to Dismiss the Complaint or, in the alternative, for Summary Judgment.

[fol. 455] 2. Pending such hearing by this Court and the determination by it of plaintiffs' said Motion for Preliminary Injunction, the defendant Federal Communications Commission is suspending, and will take no steps for enforcement or application of, the Commission's Order of May 2, 1941, in Docket No. 5060, at last amended October 11, 1941, with respect to any failure by any radio station to comply with such Order.

3. Any party hereto may move before the Court to modify the terms of this stipulation to the same extent which such party would be entitled to had this stipulation been in the form of a temporary restraining order issued after hearing.

United States of America, By Samuel Brodsky, Special Assistant to the Attorney General. Federal Communications Commission, By Telford Taylor, General Counsel. Thomas E. Harris, Assistant General Counsel. Columbia Broadcasting System, Inc., By John J. Burns.

So ordered. 12 November, 1941.

Learned Hand, United States Circuit Judge. Henry W. Goddard, United States District Judge. John Bright, United States District Judge.

IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE

The Mutual Broadcasting System, Inc., having moved for an order granting it leave to intervene as a party defendant in the above entitled proceeding,

Now, upon reading and filing the notice of motion of Mutual Broadcasting System, Inc., dated December 10, 1941, and the Motion to intervene and the proposed answer of Mutual Broadcasting System, Inc., annexed thereto, and upon all the papers and proceedings herein, and upon the consent of the attorneys for all the parties hereto affixed to the foot of a copy of this order, and upon motion of Leon Lauterstein, attorneys for Mutual Broadcasting System, Inc., it is

[fols. 456-469] Ordered, that said motion be and the same hereby is granted, and it is further

Ordered, that Mutual Broadcasting System, Inc., be and the same hereby is made a party defendant in the above entitled proceeding.

Learned Hand, U. S. Circuit Judge. John Bright, U. S. District Judge. Henry W. Goddard, U. S. District Judge.

Dated, New York, December 29th, 1941.

Consented to:

John J. Burns, Attorney for Columbia Broadcasting System, Inc. Samuel Brodsky, Special Assistant to the Attorney General for the United States of America. Telford Taylor, Thomas E. Harris, Attorneys for Federal Communications Commission. Leon Lauterstein, Emanuel Dannett, Attorneys for Mutual Broadcasting System, Inc.

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[fol. 470] (Endorsed on cover: "I am in favor of denying the petition. 6/30/42. John Bright. Henry W. Goddard.)

IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 16-178

Civil Action No. 16-179

[Title omitted]

PETITION TO EXPEDITE REARGUMENT ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Now come the defendants United States of America and the Federal Communications Commission, and pray[1] the Court to reconsider its action of June 18, 1942, postponing [fol. 471] further proceedings in these cases until October 8, 1942, and to schedule further argument on the defendants' motions for summary judgment on July 7, 1942, or on such other date during the first two weeks of July as may be convenient.

The principal ground of this petition is that the Court's action of June 18, 1942 is not consistent with the statutory requirement that cases under the Urgent Deficiencies Act "shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day".

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[1] This prayer is made by petition rather than motion since it can appropriately be considered and acted on without oral argument or convocation of the Court. The plaintiffs in these cases made no formal motion for reargument on the defendants' motion for summary judgment, nor is the Court's action of June 18, 1942 setting the reargument for October 8 and 9, 1942 embodied in an order. As was stated to the Court on June 18, counsel for the plaintiffs agreed (subject, of course, to the Court's direction) that reargument of the motions for summary judgment should be held on June 30, 1942 or some other proximate date which would meet the Court's convenience.

In support of this petition the defendants respectfully show the Court:

(1) These suits were filed on October 31, 1941 and on February 21, 1942 this Court dismissed the complaints for lack of jurisdiction.

(2) When the plaintiffs indicated their intention to appeal to the Supreme Court, all parties cooperated in expediting the appeals so that they could be heard prior to the end of the October, 1941 Term. Seven days after entry of the orders allowing the appeals, the records were filed in the Supreme Court. On March 16, 1942, the Supreme Court entered an order noting its jurisdiction. The appellants' briefs were filed April 13, 1942 and the Government's brief was filed on April 27, 1942. Oral argument began on April 30, 1942 and was concluded on May 1, 1942.

(3) On June 1, 1942, the Supreme Court reversed the order of this Court. Under Rule 34 of the Supreme Court, the mandate would not have been returned to this Court until after the expiration of twenty-five days from the Court's decision. In order that the proceedings could go forward expeditiously, the parties stipulated that the mandate could issue forthwith.

[fol. 472] (4) On June 8, 1942, the day the Supreme Court returned the mandate, counsel for the Government telephoned counsel for the plaintiff in No. 16-179 and offered to rest its motion for summary judgment on the argument held in January, without further argument. Two days later counsel for the plaintiff in No. 16-179 informed counsel for the Government that the plaintiffs in both cases wanted further argument and might wish to file additional briefs, but agreed that the reargument should be held at this term of Court. It was stated that counsel for the plaintiffs did not desire a full reargument but would limit themselves to contending further that the case should not be disposed of on the motion for summary judgment, but only after a *trial de novo* and the taking of evidence before the full Court. On June 16 counsel for the plaintiff in No. 16-179 informed counsel for the Government that the plaintiffs in both cases had selected June 30th as the date for reargument, and would request the Court to convene on that date.

(5) On June 18, 1942, this Court met and considered the parties' request for hearing on June 30. It determined that further proceedings should be postponed until October 8, 1942.

(6) The Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 220, 28 U. S. C. sec. 47, which is expressly made applicable to suits to enjoin the enforcement of orders of the Federal Communications Commission (Communications Act of 1934, 48 Stat. 926, 47 U. S. C. sec. 402 (a)), provides in part as follows:

"The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day * * *; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition * * * shall apply."

[fol. 473] The Supreme Court has said that one extraordinary feature of cases arising under the Urgent Deficiencies Act is that:

"Upon both the trial court and the Supreme Court rests the obligation to give the case precedence over others.

* * * * * * * * *

"In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof. In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays ordinarily incident to litigation." (*United States* v. *Griffin*, 303 U. S. 226, 232-233.)

See also, *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 14; *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317, 320-321; and *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 545.

(7) It is believed that to postpone further proceedings in this case until October 8, 1942, would be to nullify the expediting provisions of the Urgent Deficiencies Act. We,

of course, appreciate the fact that the dockets of the members of this Court are crowded and that some cases must, therefore, give way to others. However, it is submitted that it is the plain mandate of Congress that cases under the Urgent Deficiencies Act should be given precedence and heard forthwith.

(8) Holding this reargument at an early date will greatly expedite the final disposition of these cases. If the Court agrees with the Government's contention that no *trial de novo* is necessary, the cases will be available for final disposition without further hearing. If the Court determines that a trial should be held, the parties will be so informed and can immediately commence to prepare for trial, before the Court or before a Special Master (*Borden's Farm Products Co.* v. *Ten Eyck*, 11 F. Supp. 599, aff'd. 297 U. S. [fol. 474] 251). As the situation now stands, there will be a delay of over three months before the parties even learn whether or not there is to be a trial.

(9) The fact that the administrative proceedings before the Commission covered three years in no way affects the need for expedition of this litigation:

(a) It cannot seriously be argued that the Commission should have formulated its policies without careful study and due deliberation. In the nature of things, the careful formulation of important policies by an administrative body, in a field where a full understanding of the facts is essential, is time-consuming.

(b) At the hearing on June 18, 1942, counsel for the plaintiff in No. 16-179 stressed the lapse of time between the conclusion of the hearings before the Commission and the final promulgation of the rules here attacked.[2] Counsel for the plaintiffs were not, as was the Commission, confronted with the responsibility of comprehending and analyzing 8,713 pages of testimony and 707 exhibits, preparing a comprehensive and accurate report, and carefully weigh-

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[2] For the convenience of the Court, a copy of the Stenographer's Minutes of the proceedings on June 18, 1942, is attached to this petition as Exhibit A. The remarks of counsel for the plaintiff referred to above appear at the top of page 412.

ing the significance of the facts in order to develop a policy which would serve the public interest. It hardly lies in the mouth of counsel for the plaintiffs to attack the Commission's performance of these difficult functions as too deliberate, particularly since, as the Commission's records disclose, the date for filing briefs before the full Commission was twice postponed at the request of the plaintiffs in these cases.

[fol. 475], (c) In any event, since the decision of the Supreme Court it is clear that these are cases under the Urgent Deficiencies Act, and Congress has declared and the Supreme Court has emphasized that such cases must be handled expeditiously. The situation in these cases is in no way unique; rate cases and other regulatory administrative proceedings frequently consume several years, and indeed the more important the case the more likely it is that the administrative proceedings will be lengthy. It is extraordinary to suggest that the mandate of the statute may be disregarded under such circumstances.

(10) Counsel for the plaintiffs have stated to counsel for the Government that the question on which they desire reargument is whether the cases can be decided on motions for summary judgment and the administrative record before the Commission, or whether a *trial de novo* should be held.[3] Counsel for the Government believe that, assuming a reasonable degree of restraint by counsel for all parties, this limited degree of reargument need not be very time-consuming.

(11) The opinion of the Supreme Court clearly contemplates that this Court shall determine after receipt of the mandate whether and on what terms the regulations should be stayed. The opinion concludes:

"The stay now in effect will be continued on terms to be settled by the court below."

The Government regards this as continuing the stay until this Court takes further action, presumably by acting on [fol. 476] plaintiffs' motions for preliminary injunction,

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[3] See the Stenographer's Minutes of the proceedings on June 18, pages 406, 407.

which are now available for disposition. But it is respectfully urged that such disposition should be prompt, and that further argument on the motions, if any, should be had together with the reargument on the motions for summary judgment.

Under the Urgent Deficiencies Act, temporary stay orders issued by this Court are limited to sixty days. Accordingly, when this Court on March 2, 1942, allowed a temporary stay pending appeal, it limited it "until May 1st, 1942, or the argument of the appeal herein in the Supreme Court of the United States, whichever is earlier." By stipulaton of the parties the stay was continued until the last decision day of the October, 1941, Term of the Supreme Court of the United States or until the determination of the pending appeals, whichever is earlier. Thus, the stay which the Supreme Court continued is the stay originally granted by this Court on March 2, 1942, as extended by stipulation of the parties until the decision. In view of the statutory provision limiting to sixty days this Court's power to grant temporary stays, it seems highly improbable that the Supreme Court contemplated that the stay, which it continued "on terms to be settled by the court below", would, in the absence of further action by this Court, extend until October 8, 1942, a total of 130 days from the date of the Supreme Court's decision.

(12) As matters now stand, plaintiffs' request for reargument is delaying further proceedings in these cases for several months. In the meantime, the parties do not even know whether or not a *trial de novo* will be had. Wherefore, it is respectfully prayed that reargument be held at the "earliest practicable day", giving precedence to this case [fol. 477] as is required by the Urgent Deficiencies Act.

Respectfully submitted, United States of America, by Samuel Brodsky. Federal Communcations Commission, by Telford Taylor, General Counsel; Charles R. Denny, Assistant General Counsel; Harrly M. Plotkin, Counsel.

Acknowledgment of Service

Service of the foregoing "Petition to Expedite Reargument on Defendants' Motions for Summary Judgment" ac-

knowledged and a true copy received thereof this 26th day of June, 1942.

——, ——, Solicitor for National Broadcasting Company, Inc.; —— ——, Solicitor for Woodmen of the World Life Insurance Society; —— ——, Solicitor for Stromberg-Carlson Telephone Manufacturing Company; —— ——, Solicitor for Columbia Broadcasting System, Inc.; Percy H. Russell, Jr., Solicitor for Mutual Broadcasting System, Inc.

[fol. 478] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendants,

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Intervenors

ORDER ON MANDATE OF SUPREME COURT

The above named plaintiff, Columbia Broadcasting System, Inc., having appealed to the Supreme Court of the United States from the order of the specially constituted United States District Court entered herein February 21, 1942, dismissing the complaint on the ground that the Court had no jurisdiction over the subject-matter of the action, and said appeal having duly come on to be heard before the Supreme Court on the transcript of record and having been argued by counsel and the said Court having issued its mandate herein, dated June 8, 1942, wherein it was ordered, adjudged and decreed that the said order of the said District Court be and the same hereby was reversed, and that the cause be and the same thereby was remanded to the said District Court for further proceedings in conformity with the opinion of the Supreme Court, and the said mandate having been filed in the office of the Clerk of the said District Court on June 9, 1942,

[fol. 479] Now, upon said appeal and all the papers and proceedings had herein and upon said mandate, it is

Ordered, Adjudged And Decreed that the mandate of the Supreme Court of the United States, dated June 8, 1942, and filed herein on June 9, 1942 be and the same hereby is made the order and decree of this Court; and it is further

Ordered Adjudged And Decreed that the order entered herein on February 21, 1942 be and the same hereby is reversed and that this Court proceed in conformity with the opinion and decree of the Supreme Court of the United States.

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

[fol. 480] In United States District Court, Southern District of New York

Civil 16-178

National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, Plaintiffs,

vs.

The United States of America, The Federal Communications Commission and Mutual Broadcasting System, Inc., Defendants

Civil 16-179

Columbia Broadcasting System, Inc., Plaintiff,

vs.

The United States of America, Defendant

Federal Communications Commission and Mutual Broadcasting System, Inc., Intervenors

Before L. Hand, C. J., and Goddard and Bright, D. J. J.

On motions by the defendants for summary judgments dismissing the complaints herein in two actions to "annul" certain regulations of the Federal Communications Commission and to enjoin the Commission from enforcing them.

Charles R. Denny for the Commission.

Charles E. Hughes, Jr., for the Columbia Broadcasting System, Inc.

John T. Cahill for the National Broadcasting Company, Inc.

OPINION—November 16, 1942

[fol. 481] L. HAND, C. J.: These cases come before us a second time upon motions made by the defendants and the Mutual Broadcasting System—which has intervened—summarily to dismiss the complaints. The motions are made upon the complaints, upon certain affidavits of the counsel for the Commission, upon the Commission's report and all the proceedings and evidence before it, and—we shall assume—upon the affidavits filed by the plaintiffs on their motions for preliminary injunctions. We shall not repeat the outlines of the controversy as set forth in our opinion in 44 Fed. Suppl. 688, and in that of the Supreme Court which reversed our judgments dismissing the complaints, 316 U. S. 407; but shall proceed directly to consider the points raised.

The most important of these is whether the Commission had power to pass the challenged regulations. Everyone agrees that in granting licenses under §309 of Title 47, U. S. Code, it must distribute the available wave-lengths so as to give greatest possible service, and that it must see to it that all applicants have the necessary technical ability to broadcast programs, that the stations are properly constructed and properly manned and do not interfere with other stations, and that the licensees are responsible, morally and financially. All these things and perhaps more, the Commission may regulate in discharge of its duty to promote the "public convenience, interest, or necessity." The regulations at bar have, however, nothing to do with these qualifications of a licensee; they are addressed, not to his ability to broadcast any programs which he may accept, but to his freedom to procure other programs than those to which by contract with, or by the control of, the "networks" he is limited; they touch, not how he shall broadcast, but how unrestricted he shall be in doing so. The plaintiffs say that, judged both by its history and by its language, the Act gave the Commission power to consider only the qualifications first specified, leaving outside any administrative control all arrangements by which a station secures its programs. They say that, although it is true that §313 makes

"all laws * * * relating to unlawful restraints * * * applicable to * * * interest state or foreign radio communications," and that the courts have jurisdiction in this way to annul monopolies or restrictive contracts which affect broadcasting, only courts may do so; the Commission must disregard any such considerations when deciding whether to grant or refuse a license.

Section 303 defines the Commission's powers; its original was §4 of the Radio Act of 1927 which had eleven subdivisions, of which the first ten were the same as the first eleven of §303 except for a new subdivision ("g") introduced into §303. The eighth subdivision ("h") of §4 of the Radio Act (now the ninth ("i") of §303) gave the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting;" and on it the Commission particularly relied. The plaintiffs answer that it was meant merely to give the Commission control over the power and wave-lengths used by stations while connected with "networks" for "chain broadcasting." It was introduced by an amendment in the Senate and originally read that the Commission should have power, "when stations are connected by wire for chain broadcasting," to "determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting." [fol. 482] The first clause of this amendment was indeed limited as the plaintiffs say; but the same was not true of the second clause. "Equitable radio service to the listeners" was a comprehensive phrase, read most naturally, it should include the best possible service compatible with such burdens as it was reasonable to impose upon the "networks" and their "affiliates"—"equitable," that is, in the sense that the interests of both sides were to be weighed. The fact that the occasion for the amendment appears to have been the Senate's apprehension that the "networks" might drown out "unaffiliated" stations, by no means circumscribed the scope of these words. This amendment finally emerged from Conference and was enacted, in the broad terms we have quoted; it would be altogether unwarranted to assume that it was intended to adopt the limited clause and to abandon the general one. We may start therefore with the strong probability that even in the

Radio Act of 1927 the Commission had power by virtue of this subdivision to regulate "chain broadcasting" generally in the interest of "listeners."

The amendment to § 303 of the Communications Act of 1934, that is, the interpolation of subdivision "g," confirms this interpretation. That subdivision reads as follows: "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." We can see no reason for confining the last clause to scientific or engineering problems; the purpose is apparent to give the Commission power to foster the industry in all appropriate ways. It is not clear that this was a new purpose; but if it was, it infused the powers already granted in the earlier act, broadening them in accord with the changed outlook—the power granted under subdivision "i" among the rest. The duty—for the power imposed a corresponding duty—to "encourage" the "larger" use of radio incidentally presupposed a power to prevent the frustration of the purpose so disclosed; we are not to construe the section as at war with itself. Therefore, even if § 303 stood alone, we should hold that subdivision "i" granted power to the Commission to consider the effect upon a station's choice of programs of any controls or restrictions exercised by the "networks."

However, § 303 does not stand alone. In addition to providing that all laws "relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade" should apply to "radio communications," § 313 also took over from § 15 of the Act of 1927 the provision that in actions brought under those laws or in proceedings to enforce orders of the Federal Trade Commission, whenever "any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may * * * decree that the license of such licensee shall * * * be revoked." As will be observed, revocation was here made a penalty like other penalties for monopoly or restraint of trade; the courts were not to use it as a means of compelling a licensee to furnish service free from unlawful restrictions, but to punish him for his past misconduct, the discretion accorded them being exercised according to the degree of his "guilt." This was

in harmony with the general scheme, for a court is not in good position to know how far a monopolistic or unfair competitive practice may interfere with "the larger and more [fol. 483] effective use of radio in the public interest;" if any official was competent to do so, it was the Commission. Section 13 of the Radio Act of 1927 had provided that if a court revoked a license, the Commission must refuse to renew it, but it had stopped there; and, as the law then stood, it might perhaps have been argued with some show of plausibility that an applicant's monopolistic or unfair competitive practices in the past were not relevant to the grant of a license.

However that may have been, § 13 was amended in 1934 by adding a new clause, and the resultant § 311, in addition to retaining the old language forbidding the restoration of a forfeited license, contained a new one providing that the Commission is "authorized to refuse such station license" whenever the applicant had been "finally adjudged guilty" by a "Federal court of * * * attempting unlawfully to monopolize radio communication * * * or to have been using unfair methods of competition." That power was certainly not to be used as a punishment: the Commission was not to overrule the court which had decided not to impose the penalty. Such a power would have been open to serious constitutional objection. What use then was the Commission to make of an adjudication of the applicant's "guilt"? Only, we submit, by considering it as evidence that, if granted a license, he would not use it for the "public convenience, interest, or necessity," i. e. that the grant of a license would not "encourage the larger and more effective use of radio in the public interest." The necessary implication from this was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee. Thus, whatever may have been the limits of the Commission's earlier powers, manifestly after 1934 they included a consideration of how far licensees might be improperly restricted in the exploitation of their licenses.

The plaintiffs do not concede even this, as we understand it, but in any event they insist that the exercise of any such power was conditioned upon an earlier adjudication by some court. We can see no reason to suppose (al-

though apparently the Commission does not agree) that an applicant's violation of the statutes against monopoly and unfair competition, as such and alone, ever disentitles him to a license. It is indeed evidence relevant to his fitness for the reasons we have just given; but it is such only as any past conduct may be an earnest of what is to be expected in the future, and because a repetition would be prejudicial to the public interest. We construe this clause of § 311 as going no further than to provide the Commission with an estoppel as to any facts which a court may have found; these may be taken as data for any rational inference that can be drawn from them relevant to the ultimate issue; but "guilt" as "guilt" is not the ultimate issue. Certainly that is the only effect which it is necessary to give the clause; there is not the slightest warrant for inferring that in the absence of an adjudication, the Commission may not determine what has been an applicant's past conduct, or may not consider how far, if repeated, it would interfere with the fullest use of his license. Whatever may be the mysteries enveloping an adjudication of "guilt" under the Anti-Trust laws which make that issue unfit to be [fol. 484] entrusted as such to profane hands, the Commission is certainly peculiarly competent to appraise the effect upon broadcasting of restrictive or monopolistic practices, and is as competent to decide whether an applicant is likely to engage in them as it is to decide any of the other issues which come before it. The decision in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, is irrelevant; the only question decided was whether the injury suffered by an existing station was a material factor in licensing a new station.

The plaintiffs next challenge the regulations because they lay down general conditions for the grant of licenses instead of reserving decision until the issues arise upon an application. Such a doctrine would go far to destroy the power to make any regulations at all; nor can we see the advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future. It may perhaps be true that a party, who had no notice of the hearings before the Commission and no opportunity to present his side, would be entitled, when applying for a license, to a reconsideration of those findings upon which the regulations rested. None of the plaintiffs at bar are in that position; they were amply

advised of what the Commission proposed; they were invited to attend; all but the co-plaintiff "affiliates" of the National Broadcasting Company did so, put in whatever evidence they wished and were heard before the original regulations were passed, and again at the rehearing. They at any rate were accorded all the privileges they would have had if they had intervened in an application for a license. It would be futile after the expenditure of so much time and labor to hold that the proceedings were only advisory and concluded nobody; indeed, the mere fact that the regulations are "orders" reviewable under § 402(a) would seem to preclude such a conclusion. We do not understand the Supreme Court to mean that every minatory gesture of the Commission is reviewable under that section.

The next objection is that the Commission did not really find that the forbidden practices worked against "the public convenience, interest, or necessity," but that it rested upon its supposed duty to deny the applications of all who proposed to use their licenses in violation of the Anti-Trust laws. The Commission in one passage of its report does indeed seem so to have understood the statute, though it would scarcely be fair to say that it held as much; but, be that as it may, it did not base its action upon that theory. It made specific findings in the case of each regulation that the contract or the control which it forbade was against the public interest because it took away the stations' "free choice without any corresponding advantage to the industry as a whole. Each regulation was a specific exercise of power, addressed to a particular practice which interfered with the most "effective use of radio in the public interest."

The only constitutional objections which we need consider are two: that the standard set by § 303 ("public convenience, interest, or necessity") is too vague; and that the regulations invade the privilege of free speech. Although the Supreme Court has twice at least upheld the standard when applied to the construction of stations or to the allocation of wave lengths (*Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285; [fol. 485] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, 138; (semble) *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428), the plaintiffs insist that it will not serve if used to regulate the business arrangements of a station. We are assuming that when so used it demands the widest practicable variety in the

choice of programs available for broadcasting; that system which will most stimulate and liberate the ingenuity of those who purvey them to the public. There can be no doubt that, if the introductory clause of § 303 will bear that construction the test is definite enough—and indeed peculiarly adapted to the putative proficiency of the Commission in its field. Nor can we see why, when applied to the issue of the licensee's freedom from restraint, the test is not a fair gloss to be imposed upon the clause. It is impossible in a single rubric to specify all the occasions to which it will apply, and the effort at specification is usually abortive for they cannot all be foreshadowed. It is enough if the delegated power be so defined that a clue can be found in it for dealing with the several occasions which may arise. That seems to us to be the situation here.

The argument drawn from the First Amendment, as we understand it, is this. It is true that the regulations do not profess directly to control what programs the stations may broadcast; but they do so indirectly. They do this by forbidding them to make the forbidden contracts with "networks" even though they believe that these will bring them better programs than they can get in any other way; and it is not necessary for a law directly to control the substance of an utterance for it to invade the right of free speech. We agree that the regulations might be invalid though they do not prohibit programs on the basis of their contents; they do fetter the choice of the stations; absolutely free choice would include the privilege of deciding that they preferred the opportunities open to them under the "networks'" contracts to those which would be otherwise available. The Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i. e. the interests, first, of the "listeners," next, of any licensees who may prefer to be freer of the "networks" than they are, and last, of any future competing "networks." Whether or not the conflict between these interests and those of the "networks"

and their "affiliates" has been properly composed, no question of free speech can arise.

The last question upon the merits is whether the Commission's findings are so plainly without support in the evidence as to be "arbitrary or capricious," § 402(e); that is, whether the regulations are certain not to promote the "public convenience, interest, or necessity." A majority of the Commission, after a long and painstaking investigation, has concluded that the net result will be to give a larger choice to stations without sensibly diminishing the services of "chain broadcasting," which the report highly commended. We are asked to say that there is no reasonable basis for such a conclusion; to say that no reasonable person [fol. 486] could find in the evidence any support for it. The industry at large holds conflicting views; the plaintiffs on the one hand believe that the prohibitions will in the end destroy "chain broadcasting" altogether; the Mutual Broadcasting System and a number of other interested persons think otherwise. Each side has stated its reasons and the Commission has chosen. If was created to make such choices because Congress believed that it would acquire in its special sphere a skill which courts could not match; and it is now hornbook law that the conclusions of such tribunals are not to be disturbed except in the plainest case. That doctrine applies here with especial force just because the findings are necessarily prospective; time alone can decide their success or their failure. The measure of our power is to say whether there was any substantial evidence that the added freedom given to stations will outweigh the reduction in the opportunities which will remain open to the "networks." We cannot say that there was no such evidence. To take the regulation which is the head and front of the Commission's offending—3.104—it indeed does limit the power of a "network" to furnish large advertisers with the time of all its "affiliates," for it must always run the risk that after its last inquiry a station may have "sold" to another "network" the time which it proposed to "buy" of that station. On the other hand, it is certainly possible that the present contracts give the "networks" so strong a hold upon the industry as to keep down competition which would prove beneficial. Upon such an issue nobody who is not steeped in the details of the business is really entitled to an opinion, and indeed even the opinions of those who are so steeped must be largely speculation.

But that does not mean that the industry must be left to itself; the Commission was created precisely to say how far it was best to let things stand, and how far to intervene.

There remains only the question of procedure: whether a motion for summary judgment is proper, or whether, as the plaintiffs argue, the causes should go to trial and be heard upon evidence taken *de novo*. That depends upon what effect we should give to the Commission's findings. If the plaintiffs intervened in a proceeding by one of their "affiliates" for the renewal of a license, they could not compel the Commission to reconsider the findings of the report. As we have said, they had had adequate notice and full opportunity to be heard; indeed neither of the complaints alleges that they had not. Upon appeal to the Court of Appeals of the District of Columbia under § 402(b), the whole record before the Commission upon the hearings which resulted in the regulations would be part of the record, and the only issues open would be whether there was substantial support for the findings in the record, and whether the findings were "arbitrary or capricious," § 402(c). That record and those issues are before us here. The plaintiffs did not choose to wait and intervene, but adopted the alternative of an action in equity to "set aside" and "annul" the regulations as "orders." The reason that they have been allowed to proceed in this way is that the regulations inflicted a present injury upon them from which they were entitled to present relief; but the determining issues in each case are the same. Congress, having meant the validity of an order refusing a license to be determined as an appeal upon the record made before the Commission, cannot have meant to allow a larger scope of review because the Commission threatens for the same reasons to refuse all licenses.

[fol. 487] This is confirmed by considering what use we could make of any evidence if we took it. It might go to show that the Commission had failed to give adequate notice to the plaintiff of what it proposed, or an adequate opportunity to put in their own evidence, or an adequate hearing upon all the evidence; but aside from the fact that the record is before us and does not bear out such a contention, neither complaint, as we have just said, alleges anything of the kind. On the other hand, if the evidence went to contradict or overthrow the findings, we could not bring it into hotchpot with the evidence taken by the Com-

mission, without deciding the issues in the first instance ourselves. We have no such power; it would upset the whole underlying scheme of an expert commission, whose orders must stand or fall upon such evidence as it had before it. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426. If an aggrieved party wishes to supplement that evidence he must apply to the Commission itself, § 405.

The plaintiffs somewhat faintly invoke the doctrine of *Crowell* v. *Benson*, 285 U. S. 22; *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U. S. 349, and *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38. Assuming that that doctrine is still law (*Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573; S. C. 311 U. S. 570), it does not apply. The "networks" are indubitably engaged in interstate commerce and so are their "affiliates;" it is a question of law, not of fact, whether the regulations are within the Commission's powers, and the only issue of fact, assuming it can be called such, is whether there was evidence to support the findings. Unless the distinction between what is jurisdictional and what goes to the exercise of a power is to disappear altogether, the Commission's jurisdiction did not depend upon whether they rightly estimated the "public convenience, interest, or necessity."

The complaints will be dismissed; and as there has been no trial, we need make no findings. As before, we will grant a stay, this time until February 1, 1943, or until the argument of the appeal in the Supreme Court, whichever is earlier. The same findings which we then made will serve with slight verbal changes. We are filing the judgments, the stays and findings along with this opinion.

Complaints dismissed.

[fol. 488] In United States District Court, Southern District of New York

Civil 16-179

Columbia Broadcasting System, Inc., Plaintiff,

v.

The United States of America, Defendant

Federal Communications Commission and Mutual Broadcasting System, Inc., Interveners

Order Dismissing Complaint—November 16, 1942

Before: L. Hand, C. J., and Goddard and Bright, D. JJ.

This cause came on to be heard at the October, 1942 term of this court and was argued by counsel; and thereupon, and upon consideration thereof, it is

Ordered, Adjudged and Decreed that the complaint herein be, and the same hereby is, dismissed on the merits.

Learned Hand, Circuit Judge; Henry W. Goddard, District Judge; John Bright, District Judge.

[fol. 489] In United States District Court, Southern District of New York

[Title omitted]

Findings of Fact and Conclusions of Law

I. That if the Federal Communications Commission, pending the plaintiff's appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; the plaintiff will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the

evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two and one half months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to [fol. 490] the plaintiff arising from enforcement, if the conditions mentioned in the First Finding exist.

That the plaintiff is entitled to a stay pending its appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of February, 1943, whichever is earlier.

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

IN UNITED STATES DISTRICT COURT

DECREE GRANTING TEMPORARY RESTRAINING ORDER

This cause came on to be further heard at the October, 1942, term of this court and was argued by counsel and thereupon, upon consideration thereof, it appearing that the relief herein granted is necessary to preserve the status quo pending an appeal by the plaintiff to the Supreme Court, for the reasons appearing in the Findings of Fact filed herewith, it is

Ordered, Adjudged and Decreed that until February 1, 1943, or the argument of the appeal herein in the Supreme Court of the United States, whichever is earlier, the Federal Communications Commission be and the same hereby is restrained from enforcing those regulations which were issued in their amended form on October 11, 1941, and which [fol. 491] are known as "Order in Docket No. 5060."

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

[fol. 492] In United States District Court, Southern District of New York

[Title omitted]

Petition for a Direct Appeal to the Supreme Court of the United States

To The Hon. Learned Hand, Circuit Judge for the Second Circuit; The Hon. Henry W. Goddard, District Judge for the Southern District of New York; The Hon. John Bright, District Judge for the said District:

Now comes Columbia Broadcasting System, Inc., plaintiff herein, and feeling itself aggrieved by the final order or decree of the District Court rendered and entered in the above entitled cause on the 16th day of November, 1942, does hereby appeal therefrom to the Supreme Court of the United States because of errors prejudicial to plaintiff which are set forth in the assignment of errors presented and filed herewith, and prays that its appeal be allowed and that citation be issued as provided by law and that the record on appeal be made and certified and sent to the Supreme Court of the United States, in accordance with the rules of that Court.

And your petitioner further prays that an order be made fixing the amount of security which your petitioner shall give and furnish upon such appeal.

John J. Burns, Attorney for Columbia Broadcasting System, Inc.

[fol. 493] In United States District Court, Southern District of New York

Civil Action No. 16-179

Columbia Broadcasting System, Inc., Plaintiff,

v.

United States of America, Defendant

The Federal Communications Commission and Mutual Broadcasting System, Inc., Interveners

Order Allowing Appeal

The plaintiff herein having filed a petition for appeal to the Supreme Court of the United States from the decree

entered herein on November 16, 1942, and having filed its assignment of errors, it is

Ordered, that an appeal by petitioner in the above-entitled cause to the Supreme Court of the United States from the decree heretofore filed and entered herein on November 16, 1942, be and the same is hereby allowed and that the record on appeal be made and certified and sent to the Supreme Court of the United States in accordance with the rules of that Court, said appeal being hereby made returnable forty (40) days from the date hereof;

Ordered Further, that the bond on appeal, to be approved by this Court, is fixed at the sum of $——.

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

[fols. 494-495] Citation in usual form omitted in printing.

[fol. 496] In United States District Court Southern District of New York

[Title omitted]

Assignment of Errors

Comes now Columbia Broadcasting System, Inc., plaintiff in the above-entitled cause, and files the following assignment of errors upon which it will reply in the prosecution of the appeal to the Supreme Court of the United States herein applied for in said cause from the decree of the statutory three-judge District Court of the United States for the Southern District of New York entered on the 16th day of November, 1942:

1. The Court erred in ruling that the orders of the Federal Communications Commission here involved were within the authority committed to it by section 303 (i) of the Communications Act of 1934 (47 U. S. C. sec. 303(i)).

2. The Court erred in ruling that the orders of the Federal Communications Commission here involved were within the authority committed to it by the Communications Act of 1934, as amended (47 U. S. C. secs. 151-609).

3. The Court erred in failing to rule, as it should have done, that the Federal Communications Commission based

its orders here involved upon an erroneous interpretation [fol. 497] of the extent of its power and duty under the Communications Act of 1934, as amended (47 U. S. C., secs. 151-609), and that such orders should therefore be set aside.

4. The Court erred in failing to rule, as it should have done, that the Communications Act of 1934, as amended (47 U. S. C., secs. 151-609) as construed by the Court is an unlawful delegation of legislative power in contravention of Article I, Section 1 of the Constitution of the United States.

5. The Court erred in failing to rule, as it should have done, that the Communications Act of 1934, as amended (47 U. S. C., secs. 151-609) as construed by the Court is in contravention of the provisions of the First Amendment to the Constitution of the United States guaranteeing freedom of speech and of the press.

6. The Court erred in failing to rule, as it should have done, that the Communications Act of 1934, as amended (47 U. S. C., secs. 151-609) as construed by the Court is in contravention of the due process clause of the Fifth Amendment to the Constitution of the United States.

7. The Court erred in failing to rule, as it should have done, that the orders of the Federal Communications Commission here involved are arbitrary and capricious in that they bear no reasonable or rational relation to the standard of public interest, convenience and necessity provided by the Communications Act of 1934, as amended (47 U. S. C., secs. 151-609) and should therefore be set aside.

8. The Court erred in failing to order, as it should have done, a trial of the cause.

[fol.s 498-506] 9. The Court erred in dismissing the complaint.

10. The Court erred in failing to grant plaintiff's application for a preliminary injunction.

Wherefore, petitioner prays that the final order or decree entered herein on the 16th day of November, 1942, be reversed and for such other and further relief as to the Court may seem just and proper.

John J. Burns, Attorney for Columbia Broadcasting System, Inc.

[fol. 507] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

DIRECTION RE TRANSMISSION OF ORIGINAL DOCUMENTS

It Is Hereby Directed that the original of Exhibit A to the affidavit of Telford Taylor, of November 5, 1941, [fol. 508] be transmitted to the Supreme Court.

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

Agreed to: Jos. T. White, Thomas H. Middleton, David M. Wood, Samuel Brodky, Special Asst. to Atty. Gen., Charles R. Denny, Gen. Counsel F. C. C., Leon Lauterstein, John Burns.

[fol. 509] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

DIRECTION RE TRANSMISSION OF ORIGINAL DOCUMENTS

It Is Hereby Directed that the original of the Exhibit annexed to the affidavit of Frank Stanton, of December 12, 1941, be transmitted to the Supreme Court.

Learned Hand, U. S. C. J.; Henry W. Goddard, U. S. D. J.; John Bright, U. S. D. J.

Agreed to: John Burns, Leon Lauterstein, Atty. for Mutual; Samuel Brodsky, Special Asst. to Attorney General; Charles R. Denny, Gen. Counsel, F. C. C.

[fol. 510] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the United States District Court for the Southern District of New York:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pur-

suant to an appeal allowed in the above-entitled cause and to include in such transcript of record the following, and no other papers and exhibits, to wit:

1. Summons and complaint, together with Exhibits A to F, inclusive, thereto attached;

2. Order dated January 27, 1942, amending complaint; including Federal Communications Commission report on Chain Broadcasting May, 1941, as part of Exhibit B to the complaint;

3. Plaintiff's notice and motion for a preliminary injunction, and affidavits of William S. Paley, with Exhibits A and B thereto attached, and Herbert V. Akerberg, with Exhibits A to T, inclusive, thereto attached, in support thereof;

[fol. 511] 4. Notice of appearance of Federal Communications Commission;

5. Order permitting intervention of Mutual Broadcasting System, Inc.;

6. Stipulation and order granting suspension of Commission's Order;

7. Motion by United States of America and Federal Communications Commission to dismiss the complaint, or in the alternative for summary judgment, and affidavit of Telford Taylor, excluding Exhibit A therein referred to;

8. Affidavit of Fred Weber sworn to December 11, 1941, in opposition to motion for preliminary injunction; with Exhibits A to K, inclusive, thereto attached;

9. Affidavit of Hope H. Barrell, Jr., sworn to December 11, 1941, in opposition to motion for preliminary injunction.

10. Affidavit of Telford Taylor in opposition to plaintiff's motion for preliminary injunction.

11. Plaintiff's additional affidavits:

Affidavit of Kenneth L. Yourd sworn to January 5, 1942, with Exhibit A thereto attached;

Affidavit of Herbert V. Akerberg sworn to January 5, 1942, with Exhibits A to H, inclusive, thereto attached;

Affidavit of Frank Stanton sworn to January 5, 1942, with Exhibit A thereto attached;

Affidavit of Edward Klauber sworn to January 5, 1942, with Exhibits A and B thereto attached;

[fol. 512] Affidavits of Harold C. Read, sworn to January 9, 1942 and November 25, 1941 with Exhibits 1 and 2;

12. Plaintiff's reply affidavit of Frank Stanton sworn to January 10, 1942, with Exhibits A to M, inclusive, thereto attached;

13. Affidavit of Frank Stanton sworn to December 12, 1941, with copy of December, 1941 issue of "Radio Advertising Rates and Data" attached;

14. Petition to expedite reargument and order of District Court noted thereon;

15. Majority opinion of District Court of February 21, 1942;

16. Order of the District Court on the mandate of the Supreme Court;

17. Opinion of the District Court of November 16, 1942;

18. Order or decree of November 16, 1942, dismissing complaint with notation thereon of date of entry;

19. Findings of Fact and conclusion of law in support of order maintaining *status quo* pending appeal;

20. Order maintaining *status quo* until February 1, 1943, or argument of the appeal;

21. Petition for appeal;

22. Assignment of errors;

23. Jurisdictional statement;

24. Order allowing appeal;

25. Citation on appeal;

26. Bond on appeal;

27. Notice of appeal;

[fol. 513] 28. Statement directing attention to provisions of Paragraph 3, Rule 12;

29. Acceptance of service of appeal papers;

30. Stipulation and order directing Clerk to transmit original of Exhibit A attached to affidavit of Telford Taylor of November 5, 1941;

31. Stipulation and order directing Clerk to transmit original exhibit annexed to affidavit of Frank Stanton sworn to December 12, 1941;

32. Praecipe.

Said transcript to be prepared as required by law and the Rules of this Court, and the Rules of the Supreme Court of the United States, and is to be filed in the office of the Clerk of the Supreme Court.

Dated: November 27, 1942.

John J. Burns, Attorney for Columbia Broadcasting System, Inc.

[fols. 514-516] Service of foregoing praecipe accepted and acknowledged this 27th day of November, 1942. The de-

fendant and the interveners waive their right to file a designation of additional portions of the record.

Charles Fahy. Charles R. Denny. Leon Lauterstein.

[fols. 516a-517] [Endorsed:] United States District Court, Southern District of New York. Columbia Broadcasting System, Inc., Plaintiff, v. The United States of America, Defendant, Federal Communications Commission and Mutual Broadcasting System, Inc., Interveners. Civil 16-179. Original. Citation on Appeal. John J. Burns, Attorney for Plaintiff, 40 Wall Street, New York, N. Y. U. S. District Court, S. D. of N. Y. Filed Nov. 27, 1942.

[fol. 518] Clerk's certificate to foregoing transcript omitted in printing.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 519] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 555

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed December 5, 1942

Comes now the Appellant in the above-entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

1. The Court erred in ruling that the orders of the Federal Communications Commission here involved were within the authority committed to it by Section 303(i) of the Communications Act of 1934 (47 U. S. C. Sec. 303(i)).

2. The Court erred in ruling that the orders of the Federal Communications Commission here involved were within the authority committed to it by the Communications Act of 1934, as amended (47 U. S. C. Secs. 151-609).

3. The Court erred in failing to rule, as it should have done, that the Federal Communications Commission based its orders here involved upon an erroneous interpretation of the extent of its power and duty under the Communications Act of 1934, as amended (47 U. S. C. Secs. 151-609), and that such orders should therefore be set aside.

[fol. 520] 4. The Court erred in failing to rule, as it should have done, that the Communications Act of 1934, as amended (47 U. S. C. Secs. 151-609), as construed by the Court is an unlawful delegation of legislative power in contravention of Article I, Section 1 of the Constitution of the United States.

5. The Court erred in failing to rule, as it should have done, that the Communications Act of 1934, as amended (47 U. S. C. Secs. 151-609), as construed by the Court is in contravention of the provisions of the First Amendment to the Constitution of the United States guaranteeing freedom of speech and of the press.

6. The Court erred in failing to rule, as it should have done, that the Communications Act of 1934, as amended (47 U. S. C. Secs. 151-609), as construed by the Court is in contravention of the due process clause of the Fifth Amendment to the Constitution of the United States.

7. The Court erred in failing to rule, as it should have done, that the orders of the Federal Communications Commission here involved are arbitrary and capricious in that they bear no reasonable or rational relation to the standard of public interest, convenience and necessity provided by the Communications Act of 1934, as amended (47 U. S. C. Secs. 151-609), and should therefore be set aside.

8. The Court erred in failing to order, as it should have done, a trial of the cause.

9. The Court erred in dismissing the complaint.

10. The Court erred in failing to grant plaintiff's application for a preliminary injunction.

[fol. 521] And the Appellant further states that only the following parts of the Record, as filed in this Court, need be printed by the Clerk in the hearing of the case:

1. Summons and complaint, together with Exhibits A to F, inclusive, thereto attached;

2. Order dated January 27, 1942, amending complaint; including Federal Communications Commission report and order on Chain Broadcasting, May 2, 1941 (furnished);

3. Plaintiff's notice and motion for a preliminary injunction, and affidavits in support thereof, including:

Affidavit of William S. Paley sworn to October 30, 1941, with Exhibits A and B thereto attached;

Affidavit of Herbert V. Akerberg sworn to October 29, 1941, with Exhibits A to T, inclusive, thereto attached;

4. Notice of appearance of Federal Communications Commission;

5. Order granting leave to Mutual Broadcasting System, Inc. to intervene;

6. Stipulation and order granting suspension of Commission's order;

7. Motion by United States of America and Federal Communications Commission to dismiss the complaint, or in the alternative for summary judgment, and affidavit of Telford Taylor sworn to November 5, 1941, excluding Exhibit A therein referred to;

8. Affidavit of Harold C. Read sworn to November 25, 1941, with Exhibits 1 and 2 thereto attached;

[fol. 522] 9. Affidavit of Fred Weber sworn to December 11, 1941, in opposition to motion for preliminary injunction, with Exhibits A to K, inclusive, thereto attached;

10. Affidavit of Hope H. Barrell, Jr., sworn to December 11, 1941, in opposition to motion for preliminary injunction;

11. Affidavit of Telford Taylor in opposition to plaintiff's motion for preliminary injunction;

12. Affidavit of Frank Stanton sworn to December 12, 1941, excluding the exhibit annexed thereto;

13. Plaintiff's additional affidavits:

Affidavit of Kenneth L. Yourd sworn to January 5, 1942, with Exhibits A and B thereto attached;

Affidavit of Herbert V. Akerberg sworn to January 5, 1942, with Exhibits A to H, inclusive, thereto attached;

Affidavit of Frank Stanton sworn to January 5, 1942, with Exhibit A thereto attached;

Affidavit of Edward Klauber sworn to January 5, 1942, with Exhibits A and B thereto attached;

14. Plaintiff's reply affidavits:

Affidavit of Frank Stanton sworn to January 10, 1942, with Exhibits A to M, inclusive, thereto attached;

Affidavit of Harold C. Read sworn to January 9, 1942;

[fol. 523] 15. Order of the District Court on the mandate of the Supreme Court;

16. Opinion of the District Court of November 16, 1942;

17. Order or decree of November 16, 1942, dismissing complaint, with notation thereon of date of entry;

18. Findings of fact and conclusion of law relating to decree granting temporary restraining order;

19. Decree granting temporary restraining order;

20. Petition for appeal;

21. Assignment of errors;

22. Order allowing appeal;

23. Citation on appeal;

24. Stipulation and order directing Clerk to transmit original of Exhibit A attached to affidavit of Telford Taylor sworn to November 5, 1941;

25. Stipulation and order directing Clerk to transmit original exhibit annexed to affidavit of Frank Stanton sworn to December 12, 1941;

26. Præcipe;

27. Statement of points to be relied upon and designation of parts of the Record to be printed.

Charles E. Hughes, Jr., Counsel for Appellant.

[fol. 524] Service of the foregoing Statement of Points to be Relied upon and Designation of the Parts of the Record to be Printed is hereby acknowledged this 4th day of December, 1942.

Charles Fahy, by Harry M. Plotkin, Solicitor General of the United States. Charles R. Denny, General Counsel of the Federal Communications Commission. Percy H. Russell, Jr., Attorney for Mutual Broadcasting System, Inc.

[fol. 525] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 555

DESIGNATION OF ADDITIONAL PORTIONS OF RECORD—Filed December 9, 1942

In addition to the portions of the record designated for printing by appellant, appellee desires that the following parts of the record be printed:

1. Petition to expedite reargument and order of district court noted thereon.

2. Stipulation dated December 8, 1942.

Charles Fahy, Solicitor General of the United States.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing designation is hereby acknowledged this 8th day of December, 1942.

Charles E. Hughes, Jr., Counsel for Columbia Broadcasting System, Inc. Leon Lauterstein, Counsel for Mutual Broadcasting System, Inc.

[fol. 526] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 555

STIPULATION AS TO RECORD—Filed December 9, 1942

Subject to the approval of this Court, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the administrative record before the Commission—Exhibit A to defendants' Motion to Dismiss the Complaint or, in the Alternative, for Summary Judgment—which consists of approximately 9,000 pages and 707 exhibits, need not be printed as part of the record and that any party may refer in the briefs to any portions thereof and may include in an appendix to the briefs such portions of the administrative record as are deemed relevant.

It is further stipulated and agreed that the copy of the December, 1941 issue of "Radio Advertising Rates and Data" attached to the affidavit of Frank Stanton, sworn to December 12, 1941, need not be printed and that any party may refer in the briefs to any portions thereof and may include in an appendix to the briefs such portions thereof as are deemed relevant.

Charles Fahy, Solicitor General of the United States. Charles E. Hughes, Jr., Counsel for Columbia Broadcasting System, Inc. Leon Lauterstein, Counsel for Mutual Broadcasting System, Inc.

Dated: December 8, 1942.

[fol. 527] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 555

ORDER NOTING PROBABLE JURISDICTION—December 14, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 47,056, D. C. U. S., Southern New York. Term No. 555. Columbia Broadcasting System, Inc., Appellant, vs. The United States of America, Federal Communications Commission, and Mutual Broadcasting System, Inc. Filed November 30, 1942. Term No. 555, O. T. 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 555

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION AND MUTUAL BROADCASTING SYSTEM, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

CHARLES E. HUGHES, JR.,
JOHN J. BURNS,
Counsel for Appellant.

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UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant,

THE FEDERAL COMMUNICATIONS COMMISSION AND MUTUAL BROADCASTING SYSTEM, INC.,
Interveners.

STATEMENT AS TO JURISDICTION.

This suit was instituted in the District Court of the United States for the Southern District of New York under Section 402 (a) of the Communications Act of 1934 (47 U. S. C. Sec. 402 (a)) to set aside, annul and permanently enjoin the enforcement of an order of the Federal Communications Commission denominated "Commission Order in Docket No. 5060 in the Matter of the Investigation of Chain Broadcasting", dated May 2, 1941, as amended by order dated October 11, 1941, promulgating regulations applicable to radio stations engaged in chain or network broadcasting. Plaintiff moved for a preliminary injunction, and the United States and the Federal Communications Commission moved to dismiss the complaint or for summary judgment. The statutory three-judge court dismissed the

complaint for want of jurisdiction over the subject matter of the action (44 F. Supp. 688). On appeal (No. 1026 of the October Term, 1942) the Supreme Court of the United States reversed the decision of the statutory court and remanded the suit for further proceedings in conformity with the Supreme Court's opinion (316 U. S. 407). Following reargument on the defendant's motion to dismiss the complaint or for summary judgment and the plaintiff's motion for a preliminary injunction, the statutory three-judge court dismissed the complaint on the merits and at the same time, on its own motion, restrained the Federal Communications Commission from enforcing the regulations here in question until February 1, 1943, or the argument of the appeal in the Supreme Court, whichever is earlier.

Pursuant to Rule 12 of the Supreme Court of the United States, the petitioner, in support of the jurisdiction of the Supreme Court to review the judgment, order and decree in question, respectfully represents:

I.

Statutory Provisions Believed to Sustain Jurisdiction.

The statutory provisions believed to sustain the jurisdiction of this appeal are:

Section 402 (a) of the Communications Act of 1934, 47 U. S. C. Sec. 402 (a), which makes the provisions of the Urgent Deficiencies Act applicable to this suit; and

The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 219, 220; 28 U. S. C. Secs. 47, 47a, which provides for direct appeal to the Supreme Court of the United States from judgments or decrees of three-judge courts constituted under the Act.

II.

Statute of the United States and Order Promulgated Thereunder, the Validity of Which Is Involved.

The Federal Communications Commission, purporting to act under the authority of the Communications Act of 1934, ch. 652, 48 Stat. 1064, as amended, 47 U. S. C. Secs. 151-609, made the orders hereinafter set forth.

"Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

Commission Order in Docket No. 5060

IN THE MATTER OF THE INVESTIGATION OF CHAIN BROADCASTING

May 2, 1941.

"WHEREAS, the Commission on March 18, 1938, by Order No. 37, authorized an investigation 'to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity;'

"WHEREAS, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and 'to make reports to the Commission with recommendations for action by the Commission;'

"WHEREAS, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

"WHEREAS, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

"WHEREAS, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached;

"NOW, THEREFORE, IT IS HEREBY ORDERED, That the following regulations be and they are hereby adopted:

"3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization[1] under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization. See Chapter VII, A, 1.

"3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. See Chapter VII, A, 2; and J.

"3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: *Provided*, That a contract, arrangement, or understanding for a one-year period, may be entered into within sixty days prior to the commencement of such one-year period. See Chapter VII, B.

"3.104. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs

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"[1] The term 'network organization,' as used herein, includes national and regional network organizations. See Chapter VII, J.

are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time. See Chapter VII, C.

"3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. See Chapter VII, D.

"3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control[2] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. See Chapter VII, E.

"3.107. No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network; *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network. See Chapter VII, F.

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[2] The word 'control,' as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks."

"3.108. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. See Chapter VII, G.

"IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided*, That with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE, *Secretary*.

On October 11, 1941, the Federal Communications Commission amended the aforesaid order as follows:

"FEDERAL COMMUNICATIONS COMMISSION,

Washington, D. C.

October 11, 1941.

ORDER

"At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 11th day of October, 1941.

"The Commission having under consideration the petition of the Mutual Broadcasting System, filed August 14, 1941, requesting that the Commission amend its order entered in Docket No. 5060 promulgating regulations applicable to radio stations engaged in chain broadcasting by modifying the regulations dealing with option time and the duration of affiliation contracts, having heard oral argument on said petition and having reconsidered its report and order in Docket No. 5060,

"It Is Ordered, That the Commission's order of May 2, 1941, entered in Docket No. 5060, Be, and the Same is Hereby, Amended in the following particulars:

"Sections 3.102, 3.103, and 3.104 of the Regulations set forth in said order are hereby amended to read as follows:

"Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

"Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a net work organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

"Section 3.104. No license shall be granted to a standard broadcast station which options [3] for network

[3] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

programs any time subject to call on less than 56 days' notice, or more time than a total of three hours [4] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a.m. to 1 p.m.; 1 p.m. to 6 p.m.; 6 p.m. to 11 p.m.; 11 p.m. to 8 a.m.[5] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

"The last paragraph of said order is hereby amended to read as follows:

'It Is Further Ordered, That these regulations shall become effective immediately: *Provided,* That with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further,* That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further,* That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.'

T. J. SLOWIE,
Secretary.

"[4] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

"[5] These segments are to be determined from each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa."

The pertinent provisions of the Communications Act of 1934 are:

"Section 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,[6] and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a Commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided and which shall execute and enforce the provisions of this Act.

"Sec. 3. For the purposes of this Act, unless the context otherwise requires—

"(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not insofar as such person is so engaged, be deemed a common carrier.

"(p) 'Chain broadcasting' means simultaneous broadcasting of an identical program by two or more connected stations."

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[6] The provision relating to the promotion of safety of life and property was added by 'An Act to amend the Communications Act of 1934, etc.' Public No. 97, 75th Congress, approved and effective, May 20, 1937."

"Sec. 4. • • •

"(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

"(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commission shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense."

"Sec. 215. • • •

"(c) The Commission shall examine all contracts of common carriers subject to this Act which prevent the other party thereto from dealing with another common carrier subject to this Act, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable."

"Section 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place

in the same Territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act."

"SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

"(a) Classify radio stations;

"(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

"(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

"(d) Determine the location of classes of stations or individual stations;

"(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharp-

ness of the emissions from each station and from the apparatus therein;

"(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station shall not be made without the consent of the station licensee unless, after a public hearing, the Commision shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

"(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

"(h) Have authority to establish areas or zones to be served by any station;

"(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

"(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

"(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

"(l) Have authority to prescribe the qualifications of station operators, to clasify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commision finds qualified;

"(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) Has violated any provision of any Act, treaty, or convention binding on the United States, which the Commision is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) Has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) Has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) Has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) False or deceptive signals or communications, or

(2) A call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) Has willfully or maliciously interfered with any other radio communications or signals; or

(F) Has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

* * * * * * *

"(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or con-

vention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

"(o) Have authority to designate call letters of all stations;

"(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act;

"(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

"SEC. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

"SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

"(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

"(c) The Commission shall study the proposal that Congress by statute allocate fixed percentages of radio broadcasting facilities to particular types or kinds of non-profit radio programs or to persons identified with particular types or kinds of non-profit activities, and shall report to Congress, not later than February 1, 1935, its recommendations together with the reasons for the same.

"(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which effect the granting of original applications.

"(e) No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license."

"SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: *Provided, however,* That in cases of emergency found by

the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided further*, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

"(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation."

"SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall

notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

"(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

"(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

"(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act."

"SEC. 310. (a) The station license required hereby shall not be granted to or held by—

"(1) Any alien or the representative of any alien;

"(2) Any foreign government or the representative thereof;

"(3) Any corporation organized under the laws of any foreign government;

"(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

"(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by a foreign government or

representative thereof, or by any corporation oganized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

"Nothing in this subsection shall prevent the licensing of radio apparatus on board any vessel, aircraft, or other mobile station of the United States when the installation and use of such apparatus is required by Act of Congress or any treaty to which the United States is a party.

"(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

"SEC. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing, or attempting unlawfully to monopolize, radio communication, directly or indirectly through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combina-

tions, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation."

"SEC. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

"(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writ-

ing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

"SEC. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any license shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however*, That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court."

"SEC. 314. After the effective date of this Act no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this Act, shall by purchase, lease, construction, or

otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof

may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce."

"SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

"(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or

otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit."

"SEC. 602. (a) The Radio Act of 1927, as amended, is hereby repealed.

"(d) The first paragraph of section 11 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopilies, and for other purposes', approved October 15, 1914, is amended to read as follows:

'SEC. 11. That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows;' "

III.

Date of Judgment or Decree and Date of Application for Appeal.

The date of the decree sought to be reviewed is November 16, 1942, on which day the said decree was made and entered.

The application for this appeal was made on November 25, 1942.

IV.

Nature of the Case.

The complaint filed pursuant to Section 402 (a) of the Communications Act of 1934, as amended, alleged, among others, the following facts:

The plaintiff is engaged in the business of operating a nationwide network broadcasting system, the operations consisting essentially of furnishing radio sustaining and sponsored programs for simultaneous broadcasting by radio stations to which the programs are transmitted by wire. Most of these stations are neither owned nor leased by plaintiff, and the network programs are furnished to them pursuant to contracts with the stations, known as affiliation contracts.

The affiliation contracts provide, among other things, and subject to certain conditions and exceptions, that the station will not join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations except to broadcast special events of public importance; that the plaintiff will not furnish its network programs to any other station in the city in which the station is located, except in case of public emergency; and that the station will, upon not less than 28-days' notice

from plaintiff, broadcast all network sponsored programs furnished to it by plaintiff, subject to conditions therein specified. The contract is usually for a term of five years. These contracts constitute a relationship between the plaintiff and the affiliated stations which is and has been valuable and advantageous to both. The provisions of the contracts are indispensable to the efficient operation of the plaintiff's business and are necessary and essential for the creation and maintenance of the plaintiff's identity as a network and of its public goodwill.

The stations operate solely by virtue of licenses issued by the Federal Communications Commission. By Regulations 3.101 to 3.105, inclusive [set forth *supra* under part II hereof], the Federal Communications Commission has determined that it will not license any station having such affiliation contract after the effective date of the Regulations.

The licenses held by stations having affiliation contracts with plaintiff come up for renewal at various times commencing in the immediate future. Since the stations fear the loss of their broadcasting licenses, as a result of the Regulations, they will not negotiate for, enter into or renew affiliation contracts with the plaintiff, and, as a result of the Regulations, have threatened to cancel and repudiate their affiliation contracts. Many stations have notified plaintiff that because of the Regulations they will not be bound by their affiliation contracts after the Regulations become effective.

The Regulations impair seriously the ability of plaintiff to compete for national advertising; to maintain its identity and the public goodwill which it has built up since its inception, and to render a wide public service of informing, educating and entertaining the nation. The Regulations will make the operation of plaintiff's business burdensome and more costly, reduce its earnings, compel plaintiff to

change the fundamental character of its business and render its property and business less valuable. A network system of broadcasting, such as presently operated by plaintiff, and based upon the affiliation contracts containing the provisions alleged, is essential to the public interest, convenience and necessity, and indispensable to the fullest and most effective use of the radio facilities of the country.

The complaint further alleges that the order promulgating the rules is illegal and void and beyond the statutory power or authority of the Commission, and that if the Communications Act purports to authorize the Commission to make the regulations complained of, the said Act is an unconstitutional delegation of legislative power contrary to Article I, Section 1, of the Constitution of the United States, takes the property of plaintiff without due process of law in violation of Amendment V thereto, and constitutes an abridgement of the freedom of speech and of the press contrary to Amendment 1 thereto.

The effect of Regulation 3.106 [set forth *supra* under part II hereof], as construed by the Commission in its report, is to require that plaintiff dispose of one of the standard broadcast stations owned by it, to raise serious doubts whether plaintiff will be permitted to continue its ownership of two others, and to require plaintiff to dispose of its stations in any other locality where the Commission finds the existing standard broadcast stations to be so few or of such unequal desirability that competition would be substantially restrained.

The complaint sets forth the irreparable injury which the plaintiff would suffer as a result of the Commission's order and for which plaintiff has no adequate remedy at law, and prays that the Court set aside, annul and permanently enjoin the enforcement of that portion of the Commission's order which promulgates the regulations complained of.

Following the decision of the Supreme Court reversing the decision of the three-judge statutory court dismissing the complaint for want of jurisdiction, the cause came on for hearing before the statutory court on the defendant's motion to dismiss or for summary judgment and on the plaintiff's motion for a temporary injunction. After argument, the Court dismissed the complaint on the grounds that the order of the Commission, as amended, was within the authority granted to the Commission by the provisions of the Communications Act of 1934, that the provisions of the Act authorizing the Commission to make said order are valid and that plaintiff was not entitled to a trial.

V.

Substantial Nature of the Questions Involved.

The questions raised upon this appeal are substantial.

1. With respect to the statutory authority of the Commission to make the orders here involved, the question is whether its regulatory power extends to control of the terms upon which stations may contract with network organizations to secure a dependable supply of network programs. There is no provision of the Act in which such authority is given in terms. And we submit that the language of Section 303(i) and the other provisions in the Act together with the legislative history show that such authority cannot be implied. We also submit that the reasoning of the opinion of the Supreme Court of the United States in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474-476, supports the interpretation of the Act for which we contend. An additional substantial question on statutory authority is whether the Commission may by general regulations substantially deny licenses to affiliated stations without hearing

on the facts relating to those particular stations respectively.

2. The passages in the Commission's report indicating that its orders were predicated upon a belief that it had the power and duty to enforce the purposes which the anti-trust laws were designed to achieve, by denying licenses to any station which is engaged in practices which in its judgment are unduly restrictive of competition, raise the question whether, if the Court agrees with our contention that such interpretation of the Act was erroneous, the orders must be set aside under the rule of such cases as *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, and *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433.

3. The interpretation of the scope of the statutory standard of "public interest, convenience and necessity" which is required to justify the orders here involved, we submit, makes its limits so vague and indefinite as to constitute an invalid delegation of legislative power in contravention of Article I, Section 1, of the Constitution of the United States. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *A. L. A. Schecter Poultry Corp.* v. *United States*, 295 U. S. 495, 540. See *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 145; *Federal Radio Commission* v. *Nelson Brothers Bond and Mortgage Co.*, 289 U. S. 266, 285; *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24.

4. The question whether the Act, if construed to authorize the Commission to make the orders here in question, is invalid under the First Amendment to the Constitution of the United States, is raised, among other things, by the fact that the orders if enforced would put hundreds of stations off the air, for local as well as network service, if they did not comply with the Commission's requirements

with respect to the arrangements whereby they choose their program material. See *Lovell* v. *Griffin*, 303 U. S. 444.

5. If construed to authorize the Commission to make the order in question, the Communications Act of 1934 is invalid under the Fifth Amendment to the Constitution of the United States. The present regulations have no relation to the public good, but unreasonably and arbitrarily deprive plaintiff and its affiliated stations of their freedom of contract, which they have in no way abused, for the private benefit of other networks, stations and advertisers.

6. The regulations here in question are arbitrary and capricious in that they bear no reasonable or rational relation to the statutory standard of "public interest, convenience and necessity."

7. The question whether the plaintiff is entitled to a trial is raised by the facts that, as we submit, the hearings before the Commission and its decision thereon were legislative in character; that they were not held in pursuance of statutory requirements; that not even tentative drafts of regulations had been proposed before the evidence was closed; that there was no well-defined administrative issue upon which testimony could be presented; and that the Commission's report relies in part upon facts which were not introduced at the hearing.

VI.

Decisions Believed to Sustain Jurisdiction.

Columbia Broadcasting System, Inc., v. *United States*, 316 U. S. 407;

American Telephone & Telegraph Co. v. *United States*, 299 U. S. 232;

Ann Arbor R. Co. v. *United States*, 281 U. S. 658.

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal and that the questions presented are substantial.

Copies of the opinion delivered by the Court upon the rendering of the decree sought to be reviewed and of the prior majority opinion referred to therein are attached to this statement as Appendices A and B, respectively.

Respectfully submitted,

CHARLES E. HUGHES, JR.,
JOHN J. BURNS,
Attorneys for Columbia Broadcasting System, Inc.

Dated, November 25, 1942.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

Civil 16-178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Defendants*.

Civil 16-179.

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Intervenors*.

Before L. Hand, C. J., and Goddard and Bright, D. J.J.

On motions by the defendants for summary judgments dismissing the complaints herein in two actions to "annul" certain regulations of the Federal Communications Commission and to enjoin the Commission from enforcing them.

Charles R. Denny for the Commission.

Charles E. Hughes, Jr., for the Columbia Broadcasting System, Inc.

John T. Cahill for the National Broadcasting Company, Inc.

L. HAND, C. J.: These cases come before us a second time upon motions made by the defendants and the Mutual Broadcasting System—which has intervened—summarily

to dismiss the complaint. The motions are made upon the complaints, upon certain affidavits of the counsel for the Commision, upon the Commission's report and all the proceedings and evidence before it, and—we shall assume—upon the affidavits filed by the plaintiffs on their motions for preliminary injunctions. We shall not repeat the outlines of the controversy as set forth in our opinion in 44 Fed. Suppl. 688, and in that of the Supreme Court which reversed our judgments dismissing the complaints, 316 U. S. 407; but shall proceed directly to consider the points raised.

The most important of these is whether the Commission had power to pas the challenged regulations. Everyone agrees that in granting licenses under §309 of Title 47, U. S. Code, it must distribute the available wave-lengths so as to give greatest possible service, and that it must see to it that all applicants have the necessary technical ability to broadcast programs, that the stations are properly constructed and properly manned and do not interfere with other stations, and that the licensees are responsible, morally and financially. All these things and perhaps more, the Commission may regulate in discharge of its duty to promote the "public convenience, interest, or necessity." The regulations at bar have, however, nothing to do with these qualifications of a licensee; they are addressed, not to his ability to broadcast any programs which he may accept, but to his freedom to procure other programs than those to which by contract with, or by the control of, the "networks" he is limited; they touch, not how he shall broadcast, but how unrestricted he shall be in doing so. The plaintiffs say that, judged both by its history and by its language, the Act gave the Commission power to consider only the qualifications first specified, leaving outside any administrative control all arrangements by which a station secures its programs. They say that, although it is true that §313 makes "all laws * * * relating to unlawful restraints * * * applicable to * * * interstate or foreign radio communications," and that the courts have jurisdiction in this way to annul monopolies or restrictive contracts which affect broadcasting, only courts may do so: the Commission must disregard any such considerations when deciding whether to grant or refuse a license.

Section 303 defines the Commission's powers; its original was §4 of the Radio Act of 1927 which had eleven subdivisions, of which the first ten were the same as the first eleven of §303 except for a new subdivision ("g") introduced into §303. The eighth subdivision ("h") of §4 of the Radio Act (now the ninth ("i") of §303) gave the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting;" and on it the Commission particularly relied. The plaintiffs answer that it was meant merely to give the Commission control over the power and wave-lengths used by stations while connected with "networks" for "chain broadcasting." It was introduced by an amendment in the Senate and originally read that the Commission should have power, "when stations are connected by wire for chain broadcasting," to "determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessay in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting." The first clause of this amendment was indeed limited as the plaintiffs say; but the same was not true of the second clause. "Equitable radio service to the listeners" was a comprehensive phrase, read most naturally, it should include the best possible service compatible with such burdens as it was reasonable to impose upon the "networks" and their "affiliates"—"equitable," that is, in the sense that the interests of both sides were to be weighed. The fact that the occasion for the amendment appears to have been the Senate's apprehension that the "networks" might drown out "unaffiliated" stations, by no means circumscribed the scope of these words. This amendment finally emerged from Conference and was enacted, in the broad terms we have quoted; it would be altogether unwarranted to assume that it was intended to adopt the limited clause and to abandon the general one. We may start therefore with the strong probability that even in the Radio Act of 1927 the Commission had power by virtue of this subdivision to regulate "chain broadcasting" generally in the interest of "listeners."

The amendment to § 303 of the Communications Act of 1934, that is, the interpolation of subdivision "g", confirms this interpretation. That subdivision reads as follows: "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." We can see no reason for confining the last clause to scientific or engineering problems; the purpose is apparent to give the Commission power to foster the industry in all appropriate ways. It is not clear that this was a new purpose; but if it was, it infused the powers already granted in the earlier act, broadening them in accord with the changed outlook—the power granted under subdivision "i" among the rest. The duty—for the power imposed a corresponding duty—to "encourage" the "larger" use of radio incidentally pre-supposed a power to prevent the frustration of the purpose so disclosed; we are not to construe the section as at war with itself. Therefore, even if § 303 stood alone, we should hold that subdivision "i" granted power to the Commission to consider the effect upon a station's choice of programs of any controls or restrictions exercised by the "networks."

However, §303 does not stand alone. In addition to providing that all laws "relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade" should apply to "radio communications," § 313 also took over from § 15 of the Act of 1927 the provision that in actions brought under those laws or in proceedings to enforce orders of the Federal Trade Commission, whenever "any licensee shall be found guilty of the violatoin of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may * * * decree that the license of such licensee shall * * * be revoked." As will be observed, revocation was here made a penalty like other penalties for monopoly or restraint of trade; the courts were not to use it as a means of compelling a licensee to furnish service free from unlawful restrictions, but to punish him for his past misconduct, the discretion accorded them being exercised according to the degree of his "guilt." This was in harmony with the general scheme, for a court

is not in good position to know how far a monopolistic or unfair competitive practice may interfere with "the larger and more effective use of radio in the public interests;" if any official was competent to do so, it was the Commission. Section 13 of the Radio Act of 1927 had provided that if a court revoked a license, the Commission must refuse to renew it, but it had stopped there; and, as the law then stood, it might perhaps have been argued with some show of plausibility that an applicant's monopolistic or unfair competitive practices in the past were not relevant to the grant of a license.

However that may have been, § 13 was amended in 1934 by adding a new clause, and the resultant § 311, in addition to retaining the old language forbidding the restoration of a forfeited license, contained a new one providing that the Commission is "authorized to refuse such station license" whenever the applicant had been "finally adjudged guilty" by a "Federal court of * * * attempting unlawfully to monopolize radio communication * * * or to have been using unfair methods of competition." That power was certainly not to be used as a punishment; the Commission was not to overrule the court which had decided not to impose the penalty. Such a power would have been open to serious constitutional objection. What use then was the Commission to make of an adjudication of the applicant's "guilt"? Only, we submit, by considering it as evidence that, if granted a license, he would not use it for the "public convenience, interest, or necessity," i. e. that the grant of a license would not "encourage the larger and more effective use of radio in the public interest." The necessary implication from this was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee. Thus, whatever may have been the limits of the Commission's earlier powers, manifestly after 1934 they included a consideration of how far licensees might be improperly restricted in the exploitation of their licenses.

The plaintiffs do not concede even this, as we understand it, but in any event they insist that the exercise of any such power was conditioned upon an earlier adjudication by some court. We can see no reason to suppose (although apparently the Commission does not agree) that an applicant's violation of the statutes against monopoly and unfair competition, as such and alone, ever disentitles him to a license. It is indeed evidence relevant to his fitness for the reasons we have just given, but it is such only as any past conduct may be an earnest of what is to be expected in the future, and because a repetition would be prejudicial to the public interest. We construe this clause of § 311 as going no further than to provide the Commission with an estoppel as to any facts which a court may have found; these may be taken as data for any rational inference that can be drawn from them relevant to the ultimate issue; but "guilt" as "guilt" is not the ultimate issue. Certainly that is the only effect which it is necessary to give the clause; there is not the slightest warrant for inferring that in the absence of an adjudication, the Commission may not determine what has been an applicant's past conduct, or may not consider how far, if repeated, it would interfere with the fullest use of his license. Whatever may be the mysteries enveloping an adjudication of "guilt" under the Anti-Trust laws which make that issue unfit to be entrusted as such to profane hands, the Commission is certainly peculiarly competent to appraise the effect upon broadcasting of restrictive or monopolistic practices, and is as competent to decide whether an applicant is likely to engage in them as it is to decide any of the other issues which come before it. The decision in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, is irrelevant; the only question decided was whether the injury suffered by an existing station was a material factor in licensing a new station.

The plaintiffs next challenge the regulations because they lay down general conditions for the grant of licenses instead of reserving decision until the issues arise upon an application. Such a doctrine would go far to destroy the

power to make any regulations at all; nor can we see the advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future. It may perhaps be true that a party, who had no notice of the hearings before the Commission and no opportunity to present his side, would be entitled, when applying for a license, to a reconsideration of those findings upon which the regulations rested. None of the plaintiffs at bar are in that position; they were amply advised of what the Commission proposed; they were invited to attend; all but the co-plaintiff "affiliates" of the National Broadcasting Company did so, put in whatever evidence they wished and were heard before the original regulations were passed, and again at the rehearing. They at any rate were accorded all the privileges they would have had if they had intervened in an application for a license. It would be futile after the expenditure of so much time and labor to hold that the proceedings were only advisory and concluded nobody; indeed, the mere fact that the regulations are "orders" reviewable under § 402(a) would seem to preclude such a conclusion. We do not understand the Supreme Court to mean that every minatory gesture of the Commission is reviewable under that section.

The next objection is that the Commission did not really find that the forbidden practices worked against "the public convenience, interest, or necessity," but that it rested upon its supposed duty to deny the applications of all who proposed to use their licenses in violation of the Anti-Trust laws. The Commission in one passage of its report does indeed seem so to have understood the statute, though it would scarcely be fair to say that it held as much; but, be that as it may, it did not base its action upon that theory. It made specific findings in the case of each regulation that the contract or the control which it forbade was against the public interest because it took away the stations' free choice without any corresponding advantage to the industry as a whole. Each regulation was a specific exercise of power, addressed to a particular practice which interfered with the most "effective use of radio in the public interest."

The only constitutional objections which we need consider are two: that the standard set by § 303 ("public convenience, interest, or necessity") is too vague; and that the regulations invade the privilege of free speech. Although the Supreme Court has twice at least upheld the standard when applied to the construction of stations or to the allocation of wave lengths (*Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, 138; (semble) *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428), the plaintiffs insist that it will not serve if used to regulate the business arrangements of a station. We are assuming that when so used it demands the widest practicable variety in the choice of programs available for broadcasting; that system which will most stimulate and liberate the ingenuity of those who purvey them to the public. There can be no doubt that, if the introductory clause of § 303 will bear that construction the test is definite enough—and indeed peculiarly adapted to the putative proficiency of the Commission in its field. Nor can we see why, when applied to the issue of the licensee's freedom from restraint, the test is not a fair gloss to be imposed upon the clause. It is impossible in a single rubric to specify all the occasions to which it will apply, and the effort at specification is usually abortive for they cannot all be foreshadowed. It is enough if the delegated power be so defined that a clue can be found in it for dealing with the several occasions which may arise. That seems to us to be the situation here.

The argument drawn from the First Amendment, as we understand it, is this. It is true that the regulations do not profess directly to control what programs the stations may broadcast; but they do so indirectly. They do this by forbidding them to make the forbidden contracts with "networks" even though they believe that these will bring them better programs than they can get in any other way; and it is not necessary for a law directly to control the substance of an utterance for it to invade the right of free speech. We agree that the regulations might be invalid though they do not prohibit programs on the basis of their

contents; they do fetter the choice of the stations; absolutely free choice would include the privilege of deciding that they preferred the opportunities open to them under the "networks'" contracts to those which would be otherwise available. The Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i.e. the interests, first, of the "listeners;" next, of any licensees who may prefer to be freer of the "networks" than they are, and last, of any future competing "networks." Whether or not the conflict between these interests and those of the "networks" and their "affiliates" has been properly composed, no question of free speech can arise.

The last question upon the merits is whether the Commission's findings are so plainly without support in the evidence as to be "arbitrary or capricious," § 402(e); that is, whether the regulations are certain not to promote the "public convenience, interest, or necessity." A majority of the Commission, after a long and painstaking investigation, has concluded that the net result will be to give a larger choice to stations without sensibly diminishing the services of "chain broadcasting," which the report highly commended. We are asked to say that there is no reasonable basis for such a conclusion; to say that no reasonable person could find in the evidence any support for it. The industry at large holds conflicting views; the plaintiffs on the one hand believe that the prohibitions will in the end destroy "chain broadcasting" altogether, the Mutual Broadcasting System and a number of other interested persons think otherwise. Each side has stated its reasons and the Commission has chosen. It was created to make such choices because Congress believe that it would acquire in its special sphere a skill which courts could not match; and it is now hornbook law that the conclusions of such tribunals are not to be disturbed except in the plainest

case. That doctrine applies here with especial force just because the findings are necessarily prospective; time alone can decide their success or their failure. The measure of our power is to say whether there was any substantial evidence that the added freedom given to stations will outweigh the reduction in the opportunities which will remain open to the "networks." We cannot say that there was no such evidence. To take the regulation which is the head and front of the Commission's offending—3.104—it indeed does limit the power of a "network" to furnish large advertisers with the time of all its "affiliates," for it must always run the risk that after its last inquiry a station may have "sold" to another "network" the time which it proposed to "buy" of that station. On the other hand, it is certainly possible that the present contracts give the "networks" so strong a hold upon the industry as to keep down competition which would prove beneficial. Upon such an issue nobody who is not steeped in the details of the business is really entitled to an opinion, and indeed even the opinions of those who are so steeped must be largely speculation. But that does not mean that the industry must be left to itself, the Commission was created precisely to say how far it was best to let things stand, and how far to intervene.

There remains only the question of procedure: whether a motion for summary judgment is proper, or whether, as the plaintiffs argue, the causes should go to trial and be heard upon evidence taken *de novo*. That depends upon what effect we should give to the Commission's findings. If the plaintiff's intervened in a proceeding by one of their "affiliates" for the renewal of a license, they could not compel the Commission to reconsider the findings of the report. As we have said, they had had adequate notice and full opportunity to be heard; indeed neither of the complaints alleges that they had not. Upon appeal to the Court of Appeals of the District of Columbia under § 402(b), the whole record before the Commission upon the hearings which resulted in the regulations would be part of the record, and the only issues open would be whether there was substantial support for the findings in the record, and whether the findings were "arbitrary or capricious."

402(e). That record and those issues are before us here. The plaintiffs did not choose to wait and intervene, but adopted the alternative of an action in equity to "set aside" and "annul" the regulations as "orders." The reason that they have been allowed to proceed in this way is that the regulations inflicted a present injury upon them from which they were entitled to present relief; but the determining issues in each case are the same. Congress, having meant the validity of an order refusing a license to be determined as an appeal upon the record made before the Commission, cannot have meant to allow a larger scope of review because the Commission threatens for the same reasons to refuse all licenses.

This is confirmed by considering what use we could make of any evidence if we took it. It might go to show that the Commission had failed to give adequate notice to the plaintiff of what it proposed, or an adequate opportunity to put in their own evidence, or an adequate hearing upon all the evidence; but aside from the fact that the record is before us and does not bear out such a contention, neither complaint, as we have just said, alleges anything of the kind. On the other hand, if the evidence went to contradict or overthrow the findings, we could not bring it into hotchpot with the evidence taken by the Commission, without deciding the issues in the first instance ourselves. We have no such power; it would upset the whole underlying scheme of an expert commission, whose orders must stand or fall upon such evidence as it had before it. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426. If an aggrieved party wishes to supplement that evidence he must apply to the Commission itself, § 405.

The plaintiffs somewhat faintly invoke the doctrine of *Crowell* v. *Benson*, 285 U. S. 22, *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U. S. 349, and *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38. Assuming that that doctrine is still law (*Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573; S. C. 311 U. S. 570), it does not apply. The "networks" are indubitably engaged in interstate commerce and so are their "affiliates;".

it is a question of law, not of fact, whether the regulations are within the Commission's powers, and the only issue of fact, assuming it can be called such, is whether there was evidence to support the findings. Unless the distinction between what is jurisdictional and what goes to the exercise of a power is to disappear altogether, the Commission's jurisdiction did not depend upon whether they rightly estimated the "public convenience, interest, or necessity."

The complaints will be dismissed, and as there has been no trial, we need make no findings. As before, we will grant a stay, this time until February 1, 1943, or until the argument of the appeal in the Supreme Court, whichever is earlier. The same findings which we then made will serve with slight verbal changes. We are filing the judgments, the stays and findings along with this opinion.

Complaints dismissed.

APPENDIX B.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil 16-179.

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff*,

v.

THE UNITED STATES OF AMERICA, *Defendant*,

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Interveners*.

Before: L. Hand, C. J. and Goddard and Bright, D. JJ.

This cause came on to be heard at the January 1942 term of this court and was argued by counsel; and thereupon, and upon consideration thereof, it is

Ordered, Adjudged and Decreed that the complaint herein be, and the same hereby is, dismissed because the court has no jurisdiction over the subject-matter of the action.

LEARNED HAND (signed),
Circuit Judge.
HENRY W. GODDARD (signed),
District Judge.
——— ———,
District Judge.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil 16-178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Defendants.*

MUTUAL BROADCASTING SYSTEM, INC., *Intervener.*

Civil 16-179.

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, *Defendant,*

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Interveners.*

Before: L. Hand, C. J.: Goddard and Bright, D. JJ.

Upon motions before answer by the defendants under Rule 12 (b) (1) to dismiss for lack of jurisdiction the complaints in two actions brought under sec. 402 (a) of Title

47, U. S. Code, to enjoin and set aside certain regulations of the Federal Communications Commission.

John T. Cahill, for National Broadcasting Company.

Charles E. Hughes, Jr., for the Columbia Broadcasting System.

Telford Taylor and Thomas E. Harris, for the United States and the Commission.

Louis G. Caldwell, for the Mutual Broadcasting System, Inc., Intervener.

L. HAND, *C. J.*:

These actions were brought to declare invalid and set aside certain regulations originally promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941; in their final form they appear at the end of this opinion. After the actions were filed the Commission, on October 31, 1941, promulgated a further regulation in the form of a "minute", also appearing at the end of the opinion. Preparatory to the issuance of the regulations the Commission had held hearings at which nearly 9,000 pages of testimony were taken; among others whom it had invited to attend, were the two plaintiff "networks", which accepted and took part by introducing extensive evidence. When the regulations appeared, the "networks" brought the two actions at bar under Sec. 402 (a) of Title 47, U. S. Code, to set them aside as beyond the powers of the Commission and as arbitrary, unreasonable and without basis in the evidence. Upon the complaints so filed and voluminous affidavits they then moved for a preliminary injunction against their enforcement pendente lite. In the action brought by the National Broadcasting Company, two "affiliated stations" have joined as parties plaintiff and the United States and the Commission were originally joined as defendants; in the action brought by the Columbia Broadcasting System it alone is plaintiff and the United States is the only defendant, but the Commission later intervened. A third "network", the Mutual Broadcasting System, intervened as a defendant in both actions. The United States and the Commission have coun-

tered the plaintiffs' motions by motions, made before answer, to dismiss the complaints for lack of jurisdiction over the subject-matter under Rule 12 (b) (1), and for summary judgment under Rule 56 (b). The Mutual Broadcasting System has answered and joined in the motions of the other defendants. All these motions having come on before Judge Goddard, he assembled a court composed of three judges, to whom the hearing was transferred in accordance with the Act of October 22, 1913 (38 St. L. 219).

Since we are deciding that the District Court for the Southern District of New York has no jurisdiction over the subject-matter of the actions either as a court of three judges or of one, it will not be necessary to consider the merits; nevertheless we must say something about the background of the regulations in order to make our discussion intelligible. The business of broadcasting depends for its support principally, if not altogether, upon advertising. The broadcasting is done by "stations", each "station" selecting programs which it thinks will be popular, either spoken, sung or instrumentally performed in its own studio, or relayed to it by a "network" as will appear. Interjected among these programs, occur those fervid importunities of advertisers, upon the results of which the "station" must depend for its revenue. A single "station" dependent upon its own programs alone would be very expensive to operate, and its income would be small; especially if, as has become customary, it were to add to its advertising programs what are called "sustaining programs", which are not paid for, but which are thought to give a general popularity to the "station". These circumstances have long since resulted in the creation of "networks" of the kind with which the actions at bar are concerned; that is to say, in a widespread system of contracts of a single company with separate "stations" scattered all over the Union and known as "affiliates". The plaintiffs, National Broadcasting Company and the Columbia Broadcasting System, are two such "networks"; they own and operate broadcasting "stations" of their own, but, although they depend in part upon these as outlets, their principal reliance is upon their "affiliates". They originate a great variety of programs—usually in a studio of

one of their owned "stations"—which they transmit by telephone to the "affiliates" for broadcasting. The audience of such a "network" in this way becomes the aggregate of the audiences of its "affiliated stations", and this enables it to charge so much higher prices for advertising than the "affiliates" could charge alone, that both they and the "network" can divide the returns to their common advantage. There are four such national "networks", two owned by the National Broadcasting Company (one of which we are told it has disposed of since these actions were begun), another by the Columbia Broadcasting System, and the fourth by the Mutual Broadcasting System, which has intervened because it feels itself aggrieved by the practices against which the regulations in suit were directed.

Every broadcasting "station" must have a license and the Federal Communications Commission alone has power to grant, refuse, revoke, renew or modify licenses. The Commission also has "authority to make special regulations applicable to radio stations engaged in chain broadcasting." Sec. 303 (i). By virtue of these powers it assumed to promulgate the regulations now challenged, all of which, it will be observed, are no more than declarations of the conditions upon which the Commission will in the future issue licenses to "stations". The defendants' motions to dismiss the complaints are based upon the theory that these regulations are not "orders" within the meaning of Sec. 402 (a), and that therefore this court has no jurisdiction over them; indeed, that they are not "orders" of any sort, but merely announcements of the course which it will pursue in the future, whenever an "affiliated station" applies for a new license or for the renewal of an existing one. To this the "networks" reply that the regulations had an immediate effect; that they not only announced what would be the future practice of the Commission, but presently adjudicated the invalidity of the contracts between themselves and their "affiliates"; and that they have in fact already caused serious losses, because a number of "affiliates" have declared that they will be obliged to break their contracts when their licenses are renewed, and have

thus made it impossible for the "networks" to accept large and valuable advertising contracts.

We do not think that we need commit ourselves generally as to what "orders" are reviewable under the Act of October 22, 1913 (38 St. L. 219), which sec. 402 (a) of Title 47, U. S. Code, incorporates by reference as the measure of our jurisdiction. So far as we have found, the Supreme Court has never declared that that statute authorizes review of any decision of an administrative tribunal which neither directs anyone to do anything, nor finally adjudicates a fact to exist upon which some right or duty immediately depends. We agree that it is no answer that the decision challenged is "legislative" in character. (The Chicago Junction Case, 264 U. S. 258, 263), and, as we have just implied, it is enough if it authoritatively determines the existence of a fact that at once sets in execution some sanction, though the decision itself be not in form a command. United States *v.* Baltimore & Ohio Railroad, 293 U. S. 454; Howell *v.* United States, 300 U. S. 276; Rochester Telephone Corporation *v.* United States, 307 U. S. 125; American Federation of Labor *v.* National Labor Relations Board, 308 U. S. 401, 408. (Colorado *v.* United States, 271 U. S. 153; Claiborne-Annapolis Ferry Co. *v.* United States, 285 U. S. 382; and United States *v.* Idaho, 298 U. S. 105, though they are of the same kind, are scarcely controlling, because they turned upon sec. 1 (20) of the Interstate Commerce Act.) But decisions which are no more than announcements of future administrative action have never, so far as we can find, been treated as within this statute. That does not necessarily imply that a person presently injured is without any remedy when the threatened action would be unlawful; the situation then may present all the elements upon which equity will intervene in ordinary course. Shields *v.* Utah Idaho Central Railroad Company, 305 U. S. 177. It may be that the plaintiffs at bar could bring such actions in equity; at least it does not appear that recourse to them is positively forbidden, as was for examine the case in Venner *v.* Michigan Central, 271 U. S. 127. But even so they would not be the actions at bar, which can be brought only under the statute, since otherwise the United States cannot be sued, or the Commis-

sion sued in this district, assuming that it was in any event possible to join it at all. Such actions would have to depend jurisdictionally upon the same facts as any other action against a public officer who threatens to do an unlawful act.

We should therefore have a great deal of doubt whether the regulations could in any view be regarded as "orders" which we could review under the Act of October 22, 1913 (38 St. L. 219), if the case came to us under the statute in vacuo. It does not, because, although, as we have said, sec. 402 (a) incorporates it by reference, those orders are excepted which are mentioned in the parenthesis; to wit, all orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license." Relief from such orders is provided in sec. 402 (b), (c), (d), (e), and (f); it is by appeal to the Court of Appeals of the District of Columbia, and it is to be heard upon the record made at the hearing of an application by the Commission. The procedure upon such appeals is in substance the same as that which has now become standard for the review of the decisions of administrative tribunals in adversary proceedings. Consequently, if any of the "affiliates" of the plaintiff "networks" should hereafter apply for a renewal of their licenses; and if, as we assume it will, the Commission adheres to its regulations, the resulting modification of the license will be reviewable only in the Court of Appeals of the District and upon the record made at that hearing. We have seen, however, that the regulations are nothing more than a declaration—or if one chooses, a threat—by the Commission that it will impose those conditions upon any renewal of a license in the future. No change is made in the status of "affiliates" meanwhile; their existing contracts with the "networks" remain enforceable; nor has the Commission given any evidence of an intention to use them as the basis for a revocation of existing licenses under sec. 312 (a). On the contrary, the "minute" we have mentioned commits it to a contrary course. Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different

procedure from that which Congress has prescribed for the trial of precisely the same issues. This is inexorably true because here the only question is whether the Commission has power to impose the conditions mentioned in the regulations when a "station" applies for renewal; exactly the question which will determine the actual renewal of a license. The prescribed procedure will therefore be disregarded only because the putative wrong is merely threatened, instead of being in the very act of commission. Whatever may ordinarily be the proper scope of the word "order" in the Act of October of October 22, 1913 (38 St. L. 219), it seems to us clear that Congress could not have intended such an anomalous result as will follow upon treating these particular regulations as such "orders".

To this the plaintiffs make two answers. First, they say that the threat itself has already caused them loss, as we have said. Possibly that might support an action to compel the Commission to raise the issues immediately, as by a revocation proceeding under sec. 312 (a); even so, it should not substitute another court for the Commission and the Court of Appeals, certainly not this court in an action agains the United States and the Commission. We need not decide the point, however, because the "minute" we have quoted offers equivalent relief without risk to any "station" which may challenge the regulations. Next, the plaintiffs say that they may not be able to raise the issue in a proceeding for the renewal of a license, because the "affiliated stations" may fear to incur the Commission's displeasure. As to the National Broadcasting Company this is plainly untrue because two if its "affiliates" have joined it as plaintiffs. As to the Columbia Broadcasting System, its complaint, read most favorably, does perhaps allege that none of its "affiliates" will challenge the regulations when their licenses expire; at any rate, to avoid any rate, to avoid any doubts, we shall so assume, little as that seems likely to be the case. We may do so, because the issue is irrelevant anyway, for the plaintiff "networks" have an adequate remedy under sec. 402 itself. They allege—and there seems to be no question about it—that their interest will be adversely affected by the enforcement of the regulations; if so, they can appeal to the Court of

Appeals of the District from any order imposing unlawful conditions upon an "affiliate's" license. Sec. 402 (b) (2). It is true that the section does not in terms provide that they shall also be heard in the proceeding before the Commission under sec. 309 (a) for the "renewal or modification of a station license;" but the Commission has itself answered that objection by sec. 1,102 of its regulations which permits intervention. An unreasonable refusal of the privilege so offered would appear to be a good objection on appeal under sec. 402 (b) (2); for it is not likely that the statute which grants an appeal to all interested parties, meant not to give them the opportunity to make a record on which they can succeed upon that appeal. At any rate until the Commission shows some disposition to deny them a fair hearing in a proceeding for renewal of an "affiliate's" license, we are not to assume that it will do so. And even if that should appear, the resulting right of action, if any, would not, as we have said, be in this court or against the United States. For the foregoing reasons the complaints will be dismissed for lack of jurisdiction over the subject-matter.

We do not understand that any ndings of fact are proper under Rule 52 (a), which provides for such findings only in "actions tried upon the facts without a jury." It is true that the plaintiff have moved for a preliminary injunction, and that the rule also requires findings "in granting or refusing interlocutory injunctions;" but we are not "refusing" any injunction. Once the complaints are dismissed for lack of jurisdiction, the motions become moot and we shall not pass upon them at all. We are therefore entering judgment in each action without findings.

Complaints dismissed for lack of jurisdiction.

(S.) LEARNED HAND,
(S.) HENRY W. GODDARD.

The Regulations adopted by the Federal Communications Commission, copies of which were attached to the original opinion are omitted for the reason that they are set forth in the preceding subdivision II of the Statement as to Jurisdiction.

APPENDIX C.

The Minute of October 31, 1941.

Procedure in Docket No. 5060.

The Commission today adopted the following minute setting forth the procedure that it will follow in applying the policies announced in the Chain Broadcasting Regulations:

If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106, relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations.

Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 555

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Respondents.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

CHARLES E. HUGHES, JR.,
ALLEN S. HUBBARD,
HAROLD L. SMITH,
WRIGHT TISDALE,
Counsel for Appellant.

January 19, 1943.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

COLUMBIA BROADCASTING SYSTEM, INC., *Appellant*, v. THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Respondents.*	No. 555

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

This is an appeal by the plaintiff, Columbia Broadcasting System, Inc., from a final decree of the District Court of the United States for the Southern District of New York, dismissing the complaint in this suit.

The suit is one to set aside, annul and permanently enjoin the enforcement of orders of the Federal Communications Commission promulgating regulations applicable to radio stations engaged in chain or network broadcasting. It was instituted against the United States under Section 402(a) of the Communications Act of 1934. The Federal Communications Commission and Mutual Broadcasting System, Inc. intervened as defendants.

Appellant moved for a preliminary injunction and the United States and the Federal Communications Commission moved to dismiss the complaint or for summary judgment. A statutory three-judge court was convened under the Urgent Deficiencies Act made applicable by Section 402(a) of the Communications Act of 1934. On February 21, 1942 that court entered a decree dismissing the complaint for want of jurisdiction over the subject-matter of the suit. This Court reversed (316 U. S. 407), and remanded the suit to the Statutory Court. That court, after hearing further argument on the above motions of appellant and the United States and the Commission, respectively, dismissed the complaint on the grounds that the orders were within the statutory authority of the Commission; that the Act, construed to confer such authority, was constitutional; that the regulations promulgated by the orders were not arbitrary or capricious; and that the complaint, considered in the light of the proceedings before the Commission, presented no issue of fact necessitating a trial.

Opinions Below

The majority and dissenting opinions in the Statutory Court upon the former decree dismissing the complaint for lack of jurisdiction, which was reversed by this Court, are reported in 44 Fed. Supp. 688. The opinion of the Statutory Court (R. 483-493) upon the decree now appealed from is not yet reported.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions for direct appeal in the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219, 220; 28 U. S. C., Secs.

47-47a), made applicable by Section 402(a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C., Sec. 402(a)). The decree appealed from (R. 494) was entered November 16, 1942 and the appeal was allowed (R. 496-497) on November 27, 1942.

This Court noted probable jurisdiction on December 14, 1942.

Questions Presented

1. Whether the regulatory power conferred upon the Federal Communications Commission by the Communications Act of 1934 extends to control of the kind of contractual terms which a network organization may make with its affiliated stations as consideration for its furnishing them with a dependable supply of network programs.

2. Whether the Commission is authorized by that Act to promulgate regulations providing for the denial of renewal of licenses to all stations affiliated with network organizations which have in their affiliation contracts provisions deemed by the Commission to be restrictive of competition.

3. Whether the Commission is authorized by that Act to promulgate a regulation providing for the denial to a network organization of renewal of licenses for stations owned by it in all localities where, in the opinion of the Commission, existing stations are so few or of such unequal desirability that competition would be substantially restrained by such licensing.

4. Whether, even if the subject-matter of the regulations was generally within the authority of the Commission under the Act, the order promulgating them must never-

theless be set aside because predicated upon an erroneous interpretation by the Commission of the extent of its power and duty with respect to the promotion of competition in the broadcasting field.

5. Whether, if the Act be construed to authorize the Commission to promulgate the regulations, it is unconstitutional as: (a) an invalid delegation of legislative power under Article I, Section 1, of the Constitution of the United States; or (b) an abridgement of freedom of speech or of the press in violation of the First Amendment thereto.

6. Whether the order must be set aside because the regulations which it promulgates are arbitrary and capricious.

7. Whether the complaint contains allegations of fact upon which appellant is entitled to an answer and, if controverted thereby, to a trial.

Statute Involved

The statute involved is the Communications Act of 1934 (48 Stat. 1064; 47 U. S. C., Secs. 151-609). The sections thereof most directly involved (Sections 301, 303, 304, 307, 308, 309, 311 and 313) are printed in full in the Appendix.

Statement of Facts

The Nature of Network Broadcasting.

Appellant (hereafter referred to as "Columbia") is, and for many years has been, engaged in the business of operating a nation-wide network radio broadcasting system. Such nation-wide broadcasting is accomplished by the broadcasting of programs by the network organization simultaneously over groups of radio broadcasting stations

whose transmitters are linked together by telephone lines of appropriate quality (Complaint, Pars. Third and Fourth, R. 2, 3).

This business is based principally upon contracts, called "affiliation contracts", between Columbia and the various broadcasting stations, located in cities throughout the country, which comprise its network. Columbia supplies network programs to 123 stations, so distributed that the programs can be heard by over ninety percent of the listening audience of the nation. Only eight of these stations are operated by Columbia itself. These are WABC in New York, and stations in Washington, D. C., Chicago, St. Louis, Minneapolis, Los Angeles, Charlotte, N. C. and Boston. The remaining 115 stations are all independently owned and operated, and Columbia's relationship with them depends solely upon the terms of the affiliation contracts, a typical form of which is set forth in Exhibit A annexed to the complaint (R. 12-16). All 123 stations can operate only by virtue of licenses issued by the Federal Communications Commission (Complaint, Pars. Third and Fourth, R. 2, 3; affidavit of William S. Paley, President of Columbia, R. 220). The network organization as such is not licensed.

The American system of furnishing broadcasting service without cost to the listening public is based upon the sale of broadcasting time for advertising purposes. Virtually all the revenue of the industry, both of network organizations and broadcasting stations, is derived from such sales to advertisers. As of the end of 1940 there were about 850 commercial broadcasting stations in the United States (Paley affid., R. 221). Of these about 495 were, in 1940, affiliated with or operated by national net-

works (Commission's Report, p. 30; R. 86), but their business also includes broadcasting of local or other non-network programs. The programs broadcast, whether network or non-network, are either "commercial" ("sponsored") programs, which are those sponsored by advertisers who pay for their broadcasting, or "sustaining" programs, which are not paid for by any advertiser but, when of network origin, are furnished by the network (Complaint, Par. Fourth, R. 3). In the case of network commercial programs, the advertiser pays the network, and the network, in turn, pays the station for the use of its time upon the basis provided in the affiliation contract.

The production of sustaining programs at once serves the public interest and benefits the network and its affiliated stations by building both the good-will and the circulation (audience) which they can offer to advertisers. While many sustaining programs lie solely in the field of entertainment, they include also many of the most distinguished cultural programs, such as, in the case of Columbia, the broadcasts of the New York Philharmonic-Symphony Orchestra, the Cincinnati Conservatory of Music, and other programs of classical music, the Church of the Air, the School of the Air, broadcasts of special events of public importance, etc. (Affidavit of Frank Stanton and Exhibit A thereto, R. 313, 320A-320B), and many of the most important programs of news and news analysis (*id.*, R. 313). Columbia's sustaining programs cost it about five million dollars in 1940 (Paley affid., R. 226). Since the broadcasting industry, substantially speaking, has no revenue except that derived from the sale of station time to advertisers, the commercial programs must carry the sustaining ones financially.

The network system makes possible the production of a quality and variety of programs, both commercial and sustaining, which would otherwise not be available. The supply of performing talent outside of such metropolitan centers as New York, Chicago and Los Angeles is insufficient. Individual stations and local advertisers are financially unable, at their own expense, to plan, develop and offer to their listening audiences the expensive programs which can be economically justified only if the programs enjoy wide-spread simultaneous broadcasting (Paley affid., R. 223).

The broadcasting industry is in constant and intense competition with other advertising media, such as national magazines and newspapers, for the advertiser's dollar. Each national network organization is likewise in competition with other national networks, and the broadcasting stations with the other stations in their respective localities.

The Affiliation Contract.

Columbia's affiliation contracts create a cooperative joint enterprise, comprising Columbia and its affiliated stations, designed to compete as a unit both with other networks and stations and with other advertising media.

By Paragraph 1 of the contract (Ex. A to Complaint, R. 13) Columbia agrees to furnish to the Station all available network sustaining programs without charge, and network sponsored (commercial) programs for which clients may request broadcasting by the Station and which are consistent with Columbia's sales and program policies, and agrees to make available to the Station an average of at least sixty hours per week of network sustaining and sponsored programs. Paragraph 3 (*id.*, R. 14), and the schedule

therein referred to, provide the rates at which Columbia pays the Station for broadcasting network sponsored programs.

By Paragraph 2 (*id.*, R. 13-14) the Station agrees to broadcast all network sponsored programs furnished to it, subject to certain conditions, one being that, except in connection with occasional special events, the Station need not broadcast network sponsored programs totaling more than 50 "converted hours" (this being on the average equivalent to 79 clock hours, Complaint, Par. Fifth, R. 4) per week, and another being that the Station may require Columbia to give not less than 28 days' prior notice of the commencement of sponsored programs for new accounts. This provision is frequently called the "option time" clause, because the effect of the provision may colloquially be said to be to give Columbia an exclusive option, exercisable on 28 days' notice, on 50 converted hours per week of the Station's time. But the phrase "option time" is not found in the Columbia contracts and the analogy to options for the purchase of property is imperfect. The so-called "option time" clause is one of the agreed considerations for Columbia's furnishing its network program service, to the extent of an average of at least sixty hours per week of sustaining and commercial programs. The essence of the station's agreement is that, if Columbia is able to secure a contract from an advertiser which includes that station, the station will broadcast it at such time as the advertising contract may fix (even if it may have to displace a non-network program to do so), provided it is given twenty-eight days' notice and has no reasonable objection to the program.

By Paragraph 8 (Ex. A to Complaint, R. 16) Columbia agrees to make the Station the exclusive Columbia out-

let in the city in which it is located and not to furnish its exclusive network programs to any other station in that city, except in case of public emergency; and the Station agrees to operate as the exclusive Columbia outlet in that city and to so publicize itself, and not to join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations, except to broadcast special events of public importance.

Paragraph 15 (*id.*, R. 16) provides the term of the contract which (Complaint, Par. Fifth, R. 4) is usually five years. While the form of contract appended to the complaint includes in this paragraph a provision that the contract may be terminated at any time by Columbia on twelve months' notice (Ex. A to Complaint, R. 16), this termination provision is omitted in the contracts with 44 of the 106 stations whose contracts provide for a term in excess of two years (Affidavit of Herbert V. Akerberg, R. 302). It also appears that in 26 of these 44 cases a term of at least five years was agreed upon at the specific request of the stations, in several instances because they had the opportunity to increase their power or improve thei. plants, or both, and were unwilling to make the large capital expenditure involved without assurance that they would receive Columbia's programs for that period of years (Akerberg affid., R. 303).

The Commission's Regulations.

The Commission's order and amending order complained of promulgated eight regulations (Exs. B and C to Complaint, R. 17-19, 31-33) numbered 3.101 to 3.108, inclusive. Regulations 3.107 and 3.108 are not applicable to Columbia. Of the remaining six, Regulations 3.101 to

3.105 affect Columbia's affiliation contracts, and Regulation 3.106 affects Columbia's right to continue operation of one or more of its own stations.

Regulations 3.101 to 3.105, while ostensibly directed at the conduct of the affiliated stations, are actually directed primarily at network operations as carried on through the affiliation contracts. The important ones of them outlaw the very provisions which are most significant and essential to the relationship between Columbia and its affiliates. They do this by providing that "No license shall be granted to a standard broadcast station" having any contract with a network organization which contains the proscribed provisions. No broadcasting station can operate at all except by virtue of a license from the Commission. Hence, to remain on the air, the affiliated stations must get rid of their contracts with Columbia, or the forbidden provisions thereof, at the latest before their existing licenses expire and they apply for renewal thereof (Complaint, Pars. Fourth, Fifth, Sixth, Seventh and Ninth, R. 3-7, 9-10).

Regulation 3.101 (Ex. B to Complaint, R. 17) provides that no license shall be granted to a station having any contract with a network organization which prevents the station from broadcasting programs of any other network organization; and Regulation 3.102, as amended (Ex. C to Complaint, R. 32), provides, among other things, that no license shall be granted to a station having any contract with a network organization which prevents another station serving substantially the same area from broadcasting the network's programs not taken by the affiliated station, with a proviso that this regulation shall not be construed to prohibit a contract whereby the affiliated station is granted the first call in its primary service area upon the

programs of the network organization. These two regulations would prohibit the substance of Paragraph 8 of the contract containing the reciprocal covenants making the station the exclusive Columbia outlet in the city in which it is located and Columbia the exclusive supplier of network programs for that station.

Regulation 3.103, as amended (Ex. C to Complaint, R. 32), provides that no license shall be granted to a station having any contract with a network organization providing for affiliation for a period longer than two years.

Regulation 3.104, as amended (Ex. C to Complaint, R. 33-34), contains such drastic prohibitions with respect to the "option time" provisions of Paragraph 2 of the affiliation contract as to make them practically valueless to Columbia. It provides, among other things, that no license shall be granted to a station which options for network programs any time subject to call on less than 56 days' notice (instead of the 28 days now provided), or more time than a total of three hours within each of four defined segments of the broadcast day (instead of the maximum of 50 converted hours per week now provided). But, more importantly, it provides that even such options may not be exclusive as against other network organizations, and may not prevent the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations. The effect of this is to outlaw any reservation of the time of affiliated stations which would be good as against competing networks.

The effect of Regulations 3.101, 3.102 and 3.104 together would be to destroy the network as a joint enterprise, of which the network organization and all its affiliated stations are cooperating members, and to compel a condition

whereby, regardless of affiliation relations, every network is available to every station, and every station to every network, on a "first come, first served" basis. The proviso to 3.102 permits an arrangement whereby an affiliated station might be granted first call upon programs of its network; but 3.104 prohibits any arrangement whereby the network may be given first call upon the time of its affiliated stations. This strikes at the root of the existing affiliation system. Indeed, with the provisions for exclusive relationship and option time excised, there would not be much left which could be appropriately termed an "affiliation" contract.

The remaining regulation affecting the affiliation contract, Regulation 3.105 (Ex. B to Complaint, R. 18), provides, among other things, that no license shall be granted to a station having any contract with a network organization which prevents the station from rejecting, for the reasons described therein, programs offered by its network. Since the applicable provisions in Columbia's affiliation contract (Par. 2, R. 13) substantially correspond to the requirements stated, this regulation would, of itself, make no substantial change in the existing practice, unless the Commission construes it to permit stations to reject network sponsored programs simply because they prefer another program. If it were so construed, however, its effect would be further to weaken the affiliation relation.

Regulation 3.106 (Ex. B to Complaint, R. 18-19) is directed, not at the affiliation contract, but at operation of stations by network organizations. It provides, in so far as it applies to Columbia, that no license shall be granted to a network organization for a station in any locality where the existing stations are so few or of such unequal desirability (in terms of coverage, power, frequency or other re-

lated matters) that competition would be substantially restrained by such licensing. This regulation, as construed by the Commission in its Report (p. 68, R. 124), would require Columbia to dispose of the station owned by it at Charlotte, N. C., and would raise serious doubts whether Columbia would be allowed to continue its ownership of its stations at Minneapolis and Washington, D. C. (Complaint, Par. Seventh, as amended, R. 48).

That the regulations relating to the affiliation contracts were intended not only to prohibit the making of future contracts which might contain the proscribed provisions, but to affect existing contracts which include such terms, is explicitly recognized by the last provision of the original order of May 2, 1941 (Ex. B to Complaint, R. 19)*:

> "IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided,* That, with respect to *existing** contracts, arrangements, or understandings or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further,* That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties."

The pertinent language of the amending order of October 11, 1941 (Ex. C to Complaint, R. 33) is identical.

The Effects of the Regulations.

The allegations of the complaint that the contractual provisions in question are essential to the operation of plaintiff's network business (Par. Sixth, R. 4), and that the effect of the regulations would seriously impair plaintiff's

*All italics in quotations in this brief are supplied.

ability to maintain the integrity of its network operations, with consequent injury both to itself and to the public interest (Par. Tenth, R. 10), are supported with circumstantial detail by the affidavits.

The fundamental fact is that all of Columbia's network activities depend upon its ability to sell broadcasting time to advertisers. Many of Columbia's most important activities are not directly revenue-producing. Their economic justification is the long-range interest, far different from a day-to-day economic stake in particular pieces of business, of building up a reputation for its network whereby it can maintain a circulation which it can sell for its own benefit and that of its affiliated stations. Since that reputation depends upon the favor of the listening public, it follows that Columbia's unremunerative operations can attain the desired end only if they serve the interest of that public.

Thus, many of Columbia's most distinguished musical and other cultural programs, and many of its most important programs of news and news analysis, are sustaining programs (*supra*, p. 6). Reliable studies show that, especially in rural communities and smaller cities and towns throughout the nation, radio broadcasts are more largely relied upon by the people as a source of news even than the newspapers (Stanton affid., R. 314-320). Such pioneering undertakings as the operation of a Latin-American network, and the development of television, to which Columbia has been devoting hundreds of thousands of dollars a year, are also presently unremunerative (Paley affid., R. 243).

Moreover, if Columbia is to maintain its reputation for high standards of program quality and taste, it must refuse many commercial programs which are offered it; and it has in fact refused many million dollars of network business tendered to it in the last few years (Affidavit of

Edward Klauber, R. 321; Paley affid., R. 226). Some of the standards which Columbia had adopted, and which have led to such refusals of business are: Strict standards of suitability for commercial programs and of the products which they advertise, including the absolute prohibition of advertising of laxatives, deodorants and depilatories and graphic or repellant descriptions of bodily functions (Paley affid., R. 226, and Ex. B thereto, R. 249-255); refusal to *sell* time for discussion of controversial public issues (except to political parties during campaigns) and the allotment, instead, of time impartially to spokesmen of opposing views on a non-commercial basis through sustaining programs (Klauber affid., R. 321-323); objective standards for broadcasts of news analysis (*id.*, R. 323-325), especially in war reporting (Exs. A and B to Klauber affid., R. 327-337); and insistence that religious broadcasts shall be widely representative of all faiths and shall never be commercial programs (Klauber affid., R. 325-326).

It is apparent that Columbia is essentially a publication, addressing the ear rather than the eye, the nation-wide audience reached through its owned and affiliated stations corresponding to the circulation of a national magazine or the newspapers; and that its reputation and program enterprise are as important to its business integrity and goodwill as are the reputation and contents of any printed periodical.

Anything which impairs Columbia's ability to sell to advertisers the time of its affiliated stations strikes at the foundation of its business and threatens disintegration of all of its operations. Distinguished sustaining programs cannot be maintained unless there is a sufficient volume of commercial programs to carry them, and losses of revenue through refusing unsuitable commercial programs must be made up by getting other suitable ones.

One effect of the regulations, especially 3.104, is obvious. If Columbia cannot assure a national advertiser that it can deliver the stations which the advertiser wants, the network broadcasting method of advertising becomes much less attractive in comparison with other media.

Mr. Paley's affidavit shows (R. 239-240) that national advertising efforts must be carefully and scientifically planned; that it sometimes requires months of market study and research, program planning and negotiations, before an advertiser decides whether to use network broadcasting at all or, if so, what stations and programs to utilize; that it is accordingly practically impossible to persuade an advertiser to use a network, involving the working out of a program idea, and the expense of outstanding program talent and the like, if the network is not able to know and inform the advertiser in advance what stations and what time the network has to offer, in short what circulation he would get for the money he would spend; that under the Commission's regulation with respect to option time, the network might spend months of effort in convincing the sponsor, in helping him select the territory in which to broadcast his program, the stations to utilize, the character of the program and the talent, and then find itself unable to provide either the stations or the time desired by the advertiser in the markets which he desires to cover.

Radio's chief competitors for the advertiser's dollar, such as the newspapers, and magazines having national distribution, are able to assure advertisers of a definite circulation, and radio networks will be unable to meet their competition unless they are able to give advertisers corresponding assurance with respect to the circulation they can deliver (Paley affid., R. 227, 240). Under Regulations 3.101 and 3.104 it would be not only possible but probable

that during the course of such a negotiation between Columbia and a national advertiser for, say, the hour between eight and nine on Monday evenings, one after another of the stations supposed to be on Columbia's network would disappear because that hour—or, what would be just as bad, some quarter or half hour within it—had been preempted by other networks. If a station so much as agreed to hold the time open for one week, while an advertiser made up his mind or concluded his talent contracts, it would violate the Commission's regulation and lose its license. Obviously, the loss of even a few such stations, if they were strategically located to serve major markets which the advertiser desired to cover, would be enough to make the network no longer satisfactory to him. The resulting loss of such an advertising contract would harm not only Columbia, but every station on its network which would otherwise have participated in it.

Other disintegrating effects of the regulations are less obvious, but they are just as real. Columbia must be assured of the opportunity to sell the time of its affiliated stations in order to make up revenues sacrificed through withholding time from sale to accommodate distinguished sustaining programs, and through refusing unsuitable commercial programs. Under its existing relations with its stations Columbia knows that it can recoup itself by doing a sufficient overall business to assure its economic ability to do these things, provided only that the business is available and Columbia competitively able to get its share.

At present, when Columbia withdraws time from sale and devotes it to sustaining programs of a nature deemed not appropriate for sponsorship or of a kind which no advertiser is willing to sponsor even though they be of great service to the listening public, Columbia knows that

its affiliates cannot sell that time to another network. Columbia is therefore not making a vain sacrifice of revenue. But under the regulations, the stations might reject the sustaining program and sell the time to another network for a commercial program. Thus, Columbia would have robbed itself of an opportunity to make a sale of time without the compensating benefit of providing the listening public with an outstanding cultural or educational feature.

At present when Columbia rejects as unsuitable a commercial program offered for a certain time, it has a fair opportunity to get an acceptable program from another advertiser for that period. Even if another network should accept the program which Columbia rejected, Columbia's affiliated stations are not used thereon. But under the regulations the other network could sell the program which Columbia rejected to any of Columbia's stations which would accept it. And, if a few of Columbia's stations in important markets did accept it, Columbia would be unable to sell that period of time to another advertiser proposing a suitable program.

Again, there are many sustaining programs which, because of their nature, can be presented at one time as well as another. Under present practices it is possible to change the hour of such sustaining programs to enable Columbia to sell it to an advertiser who desires that particular time. But under the regulations many of Columbia's stations might have already sold to other networks the time for which the sustaining program had been scheduled. Thus, when Columbia sought to move the sustaining program to make way for the commercial one, it would be too late because important markets would have gone and the time would be useless to the advertiser.

Finally, apart from impairment of Columbia's economic ability to continue to render its costly sustaining service and to maintain its high commercial standards, it would be highly inequitable to make the circulation and goodwill which Columbia has built up for its affiliated stations salable by competing network organizations which had contributed nothing to such circulation and goodwill.

We feel that it is unnecessary in the ensuing argument to present further the point that the enforcement of the regulations would seriously and irreparably injure Columbia's business. That has been found, presumably on the facts above presented, by the court below in its action granting a stay (R. 494-495). Not only would the directly revenue-producing operations of Columbia be impaired, but the regulations would so imperil its entire network business that the inevitable result would be a lowering of program standards with consequent deterioriation of the value of radio broadcasting as a medium for the dissemination of news, information, ideas and entertainment to the public.

It follows that, unless the validity of the Commission's order is unassailable, Columbia is entitled to an injunction.

Specification of Errors

The District Court erred (see Assignment of Errors, R. 497-498):

In ruling that the Commission's orders were within the authority committed to it by Section 303 (i) of the Act.

In ruling that the Commission's orders were within the authority committed to it by the Act as a whole.

In failing to rule that the Commission based its orders upon an erroneous interpretation of the extent of its power and duty under the Act.

In failing to rule that the Act, as construed by the court, is an unlawful delegation of legislative power in contravention of Article 1, Section 1 of the Constitution of the United States.

In failing to rule that, if the Act is held to justify the Commission's orders, it abridges the freedom of speech or of the press, in violation of the First Amendment thereto.

In failing to rule that the Commission's orders are arbitrary and capricious.

In failing to order a trial.

In dismissing the complaint.

In failing to grant the application for preliminary injunction.

ARGUMENT

FIRST: The Commission's regulations are beyond the regulatory power committed to it by the Communications Act of 1934.

The question is whether the regulatory power of the Commission extends to control of the kind of contractual terms which a network organization may make with its affiliated stations as consideration for its furnishing them with a dependable supply of network programs. The Commission had no regulatory power at all over the network organizations as such. It accordingly attempted to accomplish its actual purpose, to get at the network organizations, by prescribing regulations ostensibly directed at the stations.

As this Court said on the former appeal (316 U. S. 407, 416-417):

> "The Commission's investigation of the contractual relations between the networks and the stations, which resulted in the order now under attack, was for the stated purpose of prescribing regulations of such relationships. The order authorizing the investigation recited that the proceeding was taken under § 303 (i) of the Act, which gives the Commission 'authority to make special regulations applicable to radio stations engaged in chain broadcasting.' Since the Commission is not in terms given authority to regulate contractual relations between the stations and the networks, regulation of them could be accomplished only by regulating licensed radio stations which participate in chain broadcasting. It was by regulations in terms applicable to such stations that the Commission sought to control their contractual relationships with the networks."

Accordingly the question which this Court must now decide is whether the Commission's "stated purpose" to "regulate contractual relations between the stations and the networks" may, consistently with the terms of the Act, be accomplished through the promulgated regulations.

Certainly the Commission is not "in terms" given authority to regulate the contractual relations of stations any more than it is to regulate those of networks. There are express provisions authorizing regulation of the conduct of stations in many aspects specifically described, but none of these subjects is even remotely similar to that of the contracts or other arrangements by which stations secure program material. The sole question is whether regulatory power over such matters may reasonably be implied from the other provisions of the Act.

We submit that such an implication of authority would be inconsistent with the purposes for which the Commission's regulatory powers were granted, and with the fair intendment of the provisions of the Act conferring those powers. If the Commission were held to have regulatory power of the breadth indicated by the opinion of the court below, and required to sustain these regulations, the result would be that this Commission, whose powers are apparently limited to specified subjects, would become the repository of regulatory control over an industry expressly declared by Congress not to be a public utility (Section 3(h)), which are broader than those customarily accorded to administrative agencies charged with the regulation of common carriers and other utilities.

The philosophy of the regulatory system established by the Act, so far as it related to broadcasters, was explained by this Court in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474-475, as follows:

> "The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of

broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.

In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia*, into an applicant's financial qualifications to operate the proposed station.

But the act does not essay to regulate the business of the licensee. *The Commission is given no supervisory control of the programs, of business management or of policy.* In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment; and financial ability to make good use of the assigned channel."

No other conclusion could have been reached consistently with the terms of the Act. All of the provisions describing the matters with respect to which the Commission is authorized to regulate the conduct of licensed stations are comprehended in the eighteen lettered subdivisions of Section 303 (Appendix, pp. ii-v).

We postpone, for the moment, discussion of subdivision (i), under which the Commission commenced these proceedings and which is chiefly relied upon by it, and subdivision (g) which the opinion of the court below also emphasized. The subjects of regulation authorized by the other subdivisions are exceedingly specific,—so specific that it is reasonable to infer that, if Congress had intended to cover the subject of contracts for program material, it would not have left it to dubious implication.

These other subdivisions authorize the regulation of matters related to the prevention of interference and the technical competence of the operation of the station. Eleven of them, subdivisions (a), (b), (c), (d), (e), (h), (j), (n), (o), (p) and (q), relate solely to purely technical matters. The Commission is authorized "from time to time, as public convenience, interest, or necessity requires" to: Classify radio stations (a); prescribe the nature of the service to be rendered by stations (b); assign bands of frequencies and determine the stations' power (c); determine the location of stations (d); regulate the kind of apparatus to be used "with respect to its external effects and the purity and sharpness of the emissions" (e); establish areas or zones to be served by the stations (h); make general rules and regulations requiring stations to keep records of programs, transmissions of energy, communications and signals (j); inspect all radio installations for the purposes stated (n);

designate call letters of stations (o); cause to be published such call letters and such other announcements and data as may be required for the efficient operations of the stations (p); and require painting or illumination of radio towers which may constitute a menace to air navigation (q). Two other subdivisions, (l) and (m), deal solely with operators' licenses, again predominantly, if not wholly, on technical grounds; and a third, (k), deals with a special situation having no relevance to the subject-matter here involved.

Aside from (i) and (g), therefore, there are two more subdivisions, (f) and (r), and the Commission bases a subordinate argument on each of them (Commission's Report, p. 85, R. 141). They read as follows:

> "(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however*, That changes in the frequencies, authorized power, or in the times of operation of any station shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;"

> "(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

The phrase relied upon by the Commission is "to carry out the provisions of this Act". It is used in (f) in a context of prevention of interference and in (r) in a context relating to international radio treaties or conventions. Apart from this, reliance on the phrase is sheer question-begging. If no authority to regulate the contractual provisions whereby broadcasting stations assure themselves of program material from national networks may be spelled out of the other provisions of the Act, manifestly such authority cannot be implied from a mere permission to make regulations "to carry out" such other provisions. The phrase relied on confers no independent power.

We thus come to subdivisions (i) and (g) of Section 303.

Section 303 (i):

This subdivision provides that the Commission, subject to the qualification with which the entire Section 303 is introduced, "from time to time as public convenience, interest, or necessity requires", shall

> "Have authority to make special regulations applicable to radio stations engaged in chain broadcasting."

The Commission interprets this language as intending a power to regulate the conduct of stations affiliated with network organizations in any way, without limitation of subject-matter, which it deems would promote the public convenience, interest, or necessity. But, even without the aid of the legislative history about to be discussed, this is an inadmissible construction. The very fact that its language is so unspecific, in contrast to the very specific terms of the

other subdivisions with which it is surrounded, warns that its intended content must be found by reference to the context in those other subdivisions. The word "special" is, we submit, the key to its true construction. The meaning is that regulations of the same sort described in the other subdivisions may be adopted to apply, not generally to all licensed stations, but "specially" to those engaged in chain broadcasting. There is nothing to justify implication of a power of regulation wholly different, not only in extent but in kind, from that included in the balance of the section.

The legislative history shows that subdivision (i) was in fact enacted to authorize the Commission to deal with a single specific problem of a technical operating nature. That problem related wholly to interference of a "special" sort involving only chain stations, and involving them only when they were "engaged in chain broadcasting". The problem arose on complaints of "independent" stations that chain stations, because of their high power and the fact that many of them were located in cities not far distant from each other, when they all simultaneously broadcast the same program, drowned out weaker stations entirely and, because of the inadequacy of the selective and tuning features of receiving sets then in use, made it impossible for listeners in many extensive areas to get any program except the chain program, on ordinary receiving sets. This was commonly referred to as "monopolizing the air" on the part of the chain stations * It had nothing to do with the arrangements by which chain stations got the chain program material, or to any contractual provisions in that connection.

*This explains why the Commission is able to refer to passages in the legislative history where "monopolization" is spoken of in connection with Section 303(i), which was Section 4 (h) of the 1927 Act. (See Rep. p. 86, R. 142.)

Title III of the Communications Act of 1934 was, substantially speaking, a re-enactment of the Radio Act of 1927 and hence the most extensive as well as the most significant history is that of the 1927 Act. Prior to the enactment of the 1927 law, the allocation of frequencies was under the jurisdiction of the Secretary of Commerce, under the Radio Act of 1912, which provided no adequate machinery for discrimination between applicants. During the years prior to 1927 several bills were introduced in Congress for the primary purpose of providing means for dealing with the confused and chaotic conditions which resulted.

The problem above described had been extensively discussed in the Senate Committee on Interstate Commerce prior to the introduction of the bill (H. R. 9971, 69th Cong., 1st Sess. (1926)) which, as amended, became the Radio Act of 1927. It had not been presented to the House of Representatives, in which that bill originated. The Senate discussion was in hearings on the bill S. 1754 which, as well as S. 1, had been introduced in the First Session of the Sixty-Ninth Congress, in which H. R. 9971 was later introduced.*

In the course of the Senate Committee hearings, Senator Dill said (Report of Hearings before Senate Committee on Interstate Commerce on S. 1 and S. 1754, 69th Cong., 1st Sess. (1926), p. 123):

> "SENATOR DILL. I want to ask Judge Davis [the Solicitor of the Department of Commerce] a question about another subject not covered in this bill, but which I want to have considered; and that is the subject of chain broadcasting. During the past few months there has grown up a system of chain broad-

*E.g. see Report of Hearings before Senate Committee on Interstate Commerce on S. 1 and S. 1754, 69th Cong., 1st Sess. (1926), pp. 123-124, 154, 169-171, 213.

casting, extending over the United States a great deal of the time. I say a great deal of the time—many nights a month—and the stations that are connected are of such widely varying meter lengths that the ordinary radio set that reaches out any distance is unable to get anything but that one program, and so, in effect, that one program *monopolizes* the air. I realize it is somewhat of a technical engineering problem, but it has seemed to many people, at least many who have written to me, that when stations are carrying on chain programs that they might be limited to the use of wave lengths adjoining or near enough to one another that they would not cover the entire dial. I do not know whether legislation ought to restrict that or whether it had better be done by regulations of the department. I want to get your opinion as to the advisability in some way protecting people who want to hear some other program than the one being broadcast by chain broadcast."

Considerable discussion ensued between Senator Dill and Solicitor Davis on this subject (*id.*, pp. 123-124). Later in the hearings, during the testimony presented by Norman Baker, then President of "American Broadcasters", there occurred the following colloquy between him and Senator Dill (*id.*, p. 169):

"SENATOR DILL: As I understand, Mr. Baker, you do not object to the chain system; it is to the large stations being put in the chain?

MR. BAKER: I do not object to chain stations, no. It is an advancement, but to say that two stations can be connected together with two telephone wires; that is nothing new. But I do object to this, that you have America there, and you can plant two stations geographically located that they have special benefit over 500 watters in this bill, and I say they

> can't go over 500 watts doing simultaneous broadcasting of the same program. Then you can connect 500 of them if you want to, because I, with an independent 500, can go just as strong as you can with yours. But what have they done? Not only that there shall be 5,000 watts in that station, but make a ruling that they can't be located closer than 500 miles apart. Chicago, 5,000 watts; 212 miles west to Davenport, 5,000 watts. Up there at Minneapolis, I don't know how far, 5,000 watts. Can you tell me the necessity of 5,000 watts chained together with a station not over 300 miles apart?"

Later (*id.*, p. 183). Mr. Baker proposed an amendment to S. 1754 which would have added to the provision which in that bill corresponded to the first sentence of the present Section 313, discussed in the next point, the following:

> "* * * and [the anti-trust laws] are hereby made to apply to the use of the ether for the transmission of radio communications as herein defined, and it is hereby declared to be an illegal combination in restraint of trade for two or more radio stations to simultaneously broadcast the same program unless the stations so broadcasting the same program shall use wave lengths within ten (10) meters in length of the wave length of each and every and all other stations simultaneously broadcasting the same program, or shall not use over 500 watts of power while so broadcasting." (See also *id.*, p. 170.)

A prohibitory amendment in the same vein was also proposed by W. J. H. Strong, testifying on behalf of the Chicago Federation of Labor (*id.*, p. 213).

In the debates in the House of Representatives on the later H. R. 9971, Congressman Celler read to the members of the House a letter from the Chicago Federation of Labor

(67 Cong. Rec., 69th Cong., 1st Sess. (1926), p. 5487), and Congressman Johnson of Texas one from a Texas farmer (*id.*, p. 5558), urging similar remedies, the latter terming the existing situation as "monopoly". But none of these proposals were incorporated into the bill, and H. R. 9971 passed the House of Representatives without any provision specifically dealing with stations engaged in chain broadcasting.

The bill then went to the Senate, which, as part of its proposed amendments, incorporated a section, Section 1(C), which made provision to guard against the practices complained of in its hearings. Doubt had developed regarding the technical practicability of the specific solutions embodied in the provisions of the several amendments proposed to S. 1754. The Senate dealt with it by providing that the Commission, from time to time, as public convenience, interest, or necessity required, should:

> "When stations are connected by wire for chain broadcasting, determine the *power* each station shall use and the *wave lengths* to be used *during the time* stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the *listeners in the communities or areas affected* by chain broadcasting." (Rep. p. 86, R. 142).

It was with respect to that language, obviously limited to the technical problem of interference, that the Senate Committee on Interstate Commerce used the phrase which the Commission quotes in its Report (*ibid.*) that this provision gives to the Commission "complete authority * * * to control chain broadcasting" (Senate Report No. 772, 69th Cong., 1st Sess. (1926), p. 3). The meaning of course

was that the provision gave complete authority with respect to the specific problem which the Senate intended to meet, the House having taken no interest in it at all.

The bill passed the Senate in that form and then went to Conference. It was the Conference Committee that revised the subdivision and reported it back in the form in which it finally became law as Section 4(h) of the Act of 1927, which is identical with Section 303(i) of the Act of 1934.

That the purpose of dealing with the technical problem alone remained the same is completely borne out by the Conference Report, which was submitted to the Senate by Senator Dill and to the House by Congressman Scott (Senate Document 200, House Report No. 1886, 69th Cong., 2d Sess. (1927), p. 17) and which stated in part as follows:

> "* * * The jurisdiction conferred in this paragraph is substantially the same as the jurisdiction conferred upon the commission by section 1(C) of the Senate amendment. * * *"

The opinion of the court below (R. 485-486) did not base its construction of Section 303(i) to any considerable extent, if at all, on any idea that the more general language in which the subdivision finally passed Congress meant anything different from that in which it was introduced in the Senate. Its view was rather that the Senate language was not limited, as we contend, to the special interference problem. The court below said (R. 485):

> "The first clause of this amendment was indeed limited as the plaintiffs say; but the same was not true of the second clause. 'Equitable radio service to the listeners' was a comprehensive phrase. Read most

naturally, it should include the best possible service compatible with such burdens as it was reasonable to impose upon the 'networks' and their 'affiliates'—'equitable,' that is, in the sense that the interests of both were to be weighed. The fact that the occasion for the amendment appears to have been the Senate's apprehension that the 'networks' might drown out 'unaffiliated' stations by no means circumscribed the scope of these words."

We submit that this construction is wholly erroneous. The maxim *"noscitur a sociis"* should be enough in itself to preclude an interpretation which would authorize the Commission to impose upon networks and affiliated stations "burdens" which have no relations to the problem which had brought the provision into being, and no relation either to the purpose and scope of the regulatory power as disclosed in Section 303 as a whole. Moreover, the phraseology of the second clause itself, upon which the court below bases its broad construction, is significant. The words "all other regulations necessary in the interest of equitable radio service to the *listeners in the communities or areas affected* by chain broadcasting" were appropriate to a provision dealing with a particular evil *effect* of chain broadcasting upon listeners in those communities and areas. The intended meaning was that, if regulation of other things than power and wave-lengths were required to permit listeners to tune in on stations other than those of the chain, they might be included. Conceivably, such other things could have included antenna design and location, type of transmitting and control equipment, and other factors which, together with power and wave length, largely determine the coverage pattern of a radio station. If the intent had been to confer authority on the Commission, not only to see that

independent as well as chain programs could be heard, but also to regulate the arrangements whereby stations might obtain chain programs, quite different phrases would have been used.

Our construction, that the authority conferred by the subdivision was intended by Congress to comprehend solely the special interference problem above described, is borne out by the following statement of Senator Dill in the course of the debates in the Senate on the Conference bill:

> "MR. DILL. What is happening to-day is that the National Broadcasting Co., which is a part of the great Radio Trust, to say the least, if not a monopoly, is hooking up stations in every community on their various wave lengths with high-powered stations and sending one program out, and they are forcing the little stations off the board so that the people can not hear anything except the one program.
>
> "There is no power to-day in the hands of the Department of Commerce to stop that practice. The radio commission will have the power to regulate and prevent it and give the independents a chance." (68 Cong. Rec., 69th Cong., 2d Sess. (1927), p. 3031).

We submit that the above is a demonstration that the natural interpretation of Section 303 (i), that the "special regulations" intended thereby are limited to regulations of the same general character comprehended in the other subdivisions of the section, is the correct interpretation. Section 303 (b), (c), and (e) give the Commission regulatory power over the nature of the service, the frequencies, and the power of, and the apparatus to be used by, stations generally. Section 303 (i) authorizes it to make special regulations on those subjects applying to chain stations when engaged in chain broadcasting.

Section 303 (g):

By subdivision (g) of Section 303 the Commission was authorized to:

> "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;"

This subdivision was added by the 1934 Act. The court below apparently regarded it as increasing mightily the powers of the Commission as expressed in the 1927 Act. Tacitly conceding that the first two clauses, "Study new uses for radio" and "provide for experimental uses of frequencies", were limited to technical and scientific matters, it held (R. 486):

> "We can see no reason for confining the last clause to scientific or engineering problems; the purpose is apparently to give the Commission power to foster the industry *in all appropriate ways*. It is not clear that this was a new purpose; but if it was, it *infused* the powers already granted in the earlier act, broadening them in accord with the *changed* outlook—the power granted under subdivision 'i' among the rest."

The court thus held that Congress meant by the vague and general phrase "generally encourage the larger and more effective use of radio in the public interest" to enlarge the scope of the regulatory power of the Commission to embrace wholly undefined subjects,—any subject in fact that the Commission thought had any relation to the public interest.

We submit that this was a wholly inadmissible interpretation. All applicable canons of construction preclude

the implication of such a breadth of power from a general phrase following and surrounded by exceedingly specific ones. It is very like the general phrases in subdivisions (f) and (r) above discussed.

There is in Title II a provision the purpose of which seems substantially similar to that of Section 303(g) in Title III. Section 213 provides in part:

> "The Commission may inquire into the management of the business of all carriers subject to this Act, and shall keep itself informed as to the manner and method in which the same is conducted and as to technical developments and improvements in wire and radio communication and radio transmission of energy *to the end that the benefits of new inventions and developments may be made available to the people of the United States.*"

Manifestly, the general expression, emphasized in the above quotation, of a purpose that the benefits of new inventions and developments in wire and radio communication and radio transmission of energy may be made available to the people of the United States, does not add new powers to those conferred in the other sections of Title II. No more, we submit, should be implied from the general authority to "encourage the larger and more effective use of radio in the public interest," in Section 303(g).

The legislative history of Section 303(g) discloses nothing to indicate that Congress conceived the final clause as having any such significance as the court below ascribes to it. It originated in a bill, S. 2910 (73rd Cong., 2nd Sess. (1934)), of which S. 3285 (73rd Cong., 2nd Sess. (1934)), which became the Communications Act of 1934 was a revi-

sion. The first mention of this subdivision was in the course of hearings before the Senate Committee on Interstate Commerce on S. 2910, where it was discussed as being the same sort of general legislation as Section 218 in Title II, above quoted. (Report of Hearings before Senate Committe on Interstate Commerce on S. 2910, 73rd Cong., 2nd Sess. (1934), pp. 84-88). Subsequently, it was supported by a representative of the United States Navy on the ground of the dependence of the Navy and its Air Force upon radio communication and the importance of the Commission's "encouragement and development" thereof (*id.*, pp. 161-162; Report of Hearings before House Committee on Interstate and Foreign Commerce on H. R. 8301, 73rd Cong., 2nd Sess. (1934), pp. 21-22). It is fair to say that the entire discussion of the proposed clause indicated an assumption that the encouragement contemplated by the final clause was to be along scientific, technical and engineering lines, just as the court below assumes that the first two clauses were to be.

A Congressional intention to interfere with liberty of contract is never lightly to be assumed. Even more inadmissible is an interpretation which, by dubious implication, would confer upon an administrative agency power to abrogate existing and subsisting contracts. Provisions having that effect appear chiefly, if not exclusively, in legislation providing for regulation of common carriers and other public utilities. And, even in them, it is expressly granted.

In this very Act, in Title II, dealing with common carriers, there are provisions prescribing required service and charges (Sec. 201), and forbidding discrimination and preference (Sec. 202), of a sort which curtail liberty of contract

and often interfere with the performance of contracts existing at the time of the passage of the legislation. But these powers are expressly given, and the machinery for the enforcement of their requirements and prohibitions meticulously described.

The Act, in fact, contains cogent internal evidence that Congress did not intend to grant power to interfere with liberty of contract or abrogate existing contracts on any subject not specifically dealt with. Section 215(c) provides:

> "The Commission shall examine all contracts of common carriers subject to this Act which prevent the other party thereto from dealing with another common carrier subject to this Act, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable."

Congress thus specifically referred to the possibility that it might desire to regulate contracts of the sort described (the grounds of possible objection to which were generally similar to those which would apply to the contractual provisions denounced by the Commission here), but indicated that it would itself later decide the matters of policy involved. So, for additional examples, the Clayton Act and the Robinson-Patman Act prescribe the standards by which the permissibility of contractual provisions are to be judged.

The court below, however, puffs up a wholly indefinite phrase into a power to abrogate any and all contracts, on any subject, which the Commission may conclude affect, in undefined ways, the public interest generally. It is inconceivable, we submit, that Congress would have conferred

a power of such breadth without establishing the standards by which the validity of the contracts was to be judged.

It follows that there is no provision in the Act giving the Commission any regulatory power over the subject-matter of this order.

As if in recognition of that, the Commission grasped at its power, conferred by other sections of Title III, to deny licenses or the renewal of licenses. Its proposition necessarily is that it may use that licensing power as a weapon to coerce stations into submitting to regulation on subjects over which the Commission has been given no regulatory power.

The Commission had not originally intended to proceed in this way. This proceeding was begun under Section 303(i) and the regulations first suggested on November 28, 1940 (Ex. F to Complaint, R. 43-46) said nothing about denial of licenses or of renewals of licenses. They read:

> "No licensee of a standard broadcast station *shall enter into* any contractual arrangement, express or implied, with a network organization" [which contains any of the disapproved provisions].

The object and effect of such a regulation would have been to continue the station as a licensee and regulate its business practices directly. But, after six months of reflection, the regulations were changed to their present form.

But this shift of position encounters other difficulties, which we discuss in the next point.

SECOND: The Commission has no authority under its licensing power to promulgate regulations providing for the denial of renewals of licenses to stations having affiliation contracts with network organizations containing provisions deemed by it to be restrictive of competition.

The Commission determined to establish a policy with respect to network contracts that the facilities of all broadcasting stations should be open to all programs offered from any source; that any "affiliation" between stations and network organizations should be of short duration and so loose that it would involve nothing restraining the freedom of the station in that regard or giving any preference to the network organization with which it had that relation.

The Commission's entire Report, so far as it deals with other than factual matters (pp. 46-89, R. 102-145), represents a search for some provision in the Act which would justify it in regulating network contracts so as to enforce that policy. It first sought to find such authority in the regulatory power given it by Section 303, from the special power with respect to stations engaged in chain broadcasting expressed in subdivision (i) and from strained implications from indefinite phrases in subdivisions (f), (g) and (r). It then sought to find, by equally strained implications from certain sections dealing with licensing of stations and transfers of station licenses, a power to establish the policy by general regulations that "no license shall be granted to a standard broadcast station" which has a contract with a network organization containing provisions of

a character deemed inconsistent with that policy. It is with the latter search that this point is concerned.

Our position is that there is nothing in the Act giving the Commission authority to establish its policy through its licensing power, any more than there is to do so through its regulatory power, and that, if the policy is to be established it must be by further Congressional action.

The general provisions regarding licensing are found in Sections 307, 308 and 309 of the 1934 Act. The initial provision is in subdivision (a) of Section 307, as follows:

> "The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act".

The qualifications on this general mandate arise from the physical fact that the number of available frequencies is limited. Subdivision (b) of Section 307 provides that "the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same". And even in the same state or community the Commission must select from all the applicants the best qualified operators. The considerations upon which this selection is to be made appear in the enumeration in Section 308 (b) of the things into which the Commission is to inquire in passing upon applications. It provides:

> "All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate

> the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. * * *"

That the considerations which may properly influence the Commission in the exercise of its licensing power are of limited scope is confirmed by the opinion in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474-5 (quoted *supra*, pp. 22-23). This shows clearly that the licensing power was not given to permit the Commission to exercise a "supervisory control of the programs, of business management of policy", of the licensees. It was certainly not given with any purpose of authorizing the Commission to impose upon the broadcasting industry any predetermined policy of its own with respect to relationships between network organizations and their affiliated stations.

This Court held several years before the *Sanders Bros.* case that the standard of "public convenience, interest, or necessity" was not intended to be of undefined scope. In *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285, it said:

> "* * * This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services, and, where

> an equitable adjustment between States is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities. * * *"

In *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, cited in the above quotation, this Court said (p. 24):

> "* * * It is a mistaken assumption that this [criterion of public convenience, interest, or necessity] is a mere general reference to *public welfare* without any standard to guide determinations. * * *"

The "context" of which this Court spoke in the *Nelson Brothers Bond & Mortgage Co.* case is found chiefly in the specifications of the Commission's regulatory power in Section 303 and the provisions, just above quoted, in Section 308(b) prescribing the contents of an application for license.

Besides the above-mentioned provisions there are sections which deal with the Commission's action on license applications in specified particular conditions. One of these is Section 310 which expressly limits the Commission's power by providing that a license shall not be "granted to or held by" alien interests as therein described. Another particular provision is that contained in Section 311, relied on by the Commission and the court below, to which extended reference will hereafter be made.

In groping for statutory backing for the use of its licensing power to regulate the terms of network contracts, the Commission first attempts to derive from certain provisions of the Act what it has called a "principle of licensee responsibility". It states this in its Report as follows (p. 66, R. 122):

"It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency.

* * * * * *

"We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.

* * * * * *

"These are principles of general application based on sections 301, 309, and 310 of the Communications Act."

Section 301 is simply the introductory section of Title III stating it to be the purpose of the Act to maintain the control of the United States over all the channels of interstate and foreign radio transmission, and "to provide for the use" of such channels "by persons for limited periods of time, under licenses granted by Federal authority". The section prohibits the use or operation of any apparatus for interstate radio transmission except under license.

The provision of Section 309 relied on is subdivision (b)(2) that every license shall contain the condition that "neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act". And the pertinent provision of Section 310 is that of subdivision (b) that the license and the rights therein granted "shall not be transferred, assigned, or in any man-

ner either voluntarily or involuntarily disposed of, * * * to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing".

Obviously no support for the policy embodied in the regulations here in question can be implied from these provisions. The station's agreement to broadcast the commercial programs furnished to it by the network organization with which it is affiliated, and under certain conditions to displace other programs to make way therefor, subject in each case to the station's right of rejection of any program not in the public interest (R. 13), involves no abdication by the licensee of control over the station. It is an exercise by the station of its responsibility as licensee to assure to the listening audience served by it an adequate supply of superior program material.

The Commission does not really stand on the thesis expressed in the passage from its Report above quoted. The Report as a whole, and the regulations themselves, show that it has no objection to a station licensee making a firm contract with a network organization in advance to broadcast its programs. The regulations are directed at the exclusive and preferential features of the affiliation contract whereby the affiliated station agrees not to broadcast the programs of any *other* network and to give its own network the right to displace other programs on 28 days' notice. In the Commission's report on the rehearing (R. 26) it said that the regulations "neither in their original form nor as herein amended, place any restrictions upon the *bona fide* purchase of station time by networks". All that the Commission insists upon, on the score of licensee responsibility, is that the station retain a right to reject an unsatisfactory network program and to substitute for

network programs features of outstanding national or local importance. And that right is reserved to Columbia's affiliates in paragraph 2 of the affiliation contract (Ex. A to Complaint, R. 13).

Next the Commission appeals to what it calls a "principle of maximum use of facilities", which it attempts to derive (Rep. pp. 80-81, R. 136-137) from Section 1 of the Act and Section 303 (g).

Section 1 of the Act simply states the general objectives thereof as being "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service"; and Section 303 (g) has already been discussed. The proposition which the Commission seeks to derive from these sections is thus stated in its Report (p. 81, R. 137):

> "* * * With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. * * *
>
> "It is no answer to say that the network stations render better service to the public than do unaffiliated stations. * * * The Commission's licensing function is not limited to determining simply whether the service of one station is satisfactory *as compared* with that of other stations. The Commission has the duty to grant licenses and renewals *only* to those applicants who propose a *maximum* utilization in the public interest of the facilities they request."

We deny that the Communications Act contemplates any such academic standard as that indicated in the above-quoted passage. As to technical matters, such as the efficiency of

an antenna, it may be that the Commission is authorized to deny a renewal of a license if the licensee, after appropriate warning, persists in the use of a design which is outmoded when a more efficient design is available at reasonable cost, and another applicant is before the Commission for the same frequency who is prepared to give better service. Power over the licensee as to such matters is expressly given in Section 303 (e) which authorizes the Commission to "Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein". But unless the regulation of contracts for program service is within the scope of the Commission's authority, it is not its function to determine whether a station licensee in entering into such a contract has made the maximum use of its facilities or not. The Communications Act has left such problems of business management to the licensee who is the judge of the adequacy of his contracts for programs. Moreover it would be most unjust to the licensee to deny a renewal of his license upon the ground that he had not made a maximum utilization of his facilities in entering into a contract with Columbia or NBC unless there was proof available that he could have obtained a different contract from another source which was more advantageous to the public.

All of the affiliation contracts of which the Commission complains have been made because the stations, as a matter of business judgment, believed that thereby they could be assured of economic advantages and superior program material and thereby would better serve the listening public and so be able to compete more effectively. That such belief was justified is shown by the Commission's Report itself. After describing the value of network broadcasting

to the industry generally, and the improvements which attended its development, it said (Rep. p. 4, R. 60):

> "From an economic standpoint, the stations themselves are in a position to benefit greatly from their participation in chain broadcasting; such broadcasting can bring them a larger share of the money expended by advertisers for national or regional coverage.* * *"

The terms of the affiliation contracts denounced by the Commission are, generally speaking, the ones most vital to Columbia. There is nothing to indicate that the stations could have got their affiliation contracts without them.

The statutory purpose in licensing is to give service to the listening public, and select, on a comparative basis from among actual applicants, the one best qualified to give it. In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, this Court said (footnote pp. 138-139) that:

> "Since the beginning of regulation under the Act of 1927 *comparative considerations* have governed the application of standards of 'public convenience, interest, or necessity' laid down by the law".

It then quoted with apparent approval an extract from the Second Annual Report of the Federal Radio Commission for 1928 (pp. 169-170) as follows:

> "* * * the commission desires to point out that the test—'public interest, convenience, or necessity'—becomes a matter of a *comparative* and not an *absolute* standard when applied to broadcasting stations. Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission

> must determine *from among the applicants before it* which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser."

These regulations would require denial of renewals to affiliated stations regardless of whether there were other equally competent, or any, applicants for licenses to take their places.

We are not here dealing with the disposition by the Commission of a particular license application where consideration may be given to the pertinent circumstances affecting the applicant and the service which the listening audience in its territory receives from the applicant and other stations serving the same territory. We are dealing with the validity of an order promulgating general regulations providing that in *no* circumstances will favorable consideration be given to a station which has certain provisions in its affiliation contract. Once the existence of such a contract appears, denial of renewal of the license follows automatically, as this Court recognized in its opinion upon the former appeal. No matter how strong may be the facts as to the qualifications of an applicant, in character and financial and technical ability, the excellence of its location and equipment, the efficiency of its operations and the satisfaction which its programs have given the listening public in its community, it will be put off the air unless it abrogates those contractual relations.

The validity of the order may be tested by what would happen to the listening public if either the affiliated stations

refused to submit to regulation of their contracts, or the network organizations refused to modify them, and the Commission had to make good on its threat. Several hundred stations would go off the air. The Commission does not deny that, speaking generally, they are intrinsically the strongest and most competent stations in the country, and those best qualified all-round to give satisfaction to the listening public. According to the Commission's own statements (Rep. pp. 51-52, R. 107-108) many of the stations affiliated with Columbia and NBC are the only stations serving large rural areas and many fair-sized cities. The importance, for example, of news broadcasts to such communities has already been pointed out (*supra*, p. 14). If these stations were denied renewals of their licenses, not only their network programs would go off the air but their non-network, local service as well.

We submit that such an order is no true exercise of the Commission's licensing function.*

Finally, the Commission grounds its asserted authority upon certain sections of the Act from which it attempts

*Under Section 309 (a), if the Commission upon examination of the application does not reach a decision that the license should be granted, it is obliged to give the applicant a hearing, after which the Commission is required to make specific findings. *Missouri Broadcasting Corp.* v. *Federal Communications Commission*, 94 F. (2d) 623 (C. of A., D. C.); *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. (2d) 554 (C. of A., D. C.), cert. den. *sub. nom.*, *Gross* v. *Saginaw Broadcasting Co.*, 305 U. S. 613. Such findings must of course relate to the interests of the listeners served by that particular station. If the decision of the Commission is adverse, Sections 402(b), (c), (d) and (e) provide for an appeal to the Court of Appeals of the District of Columbia. All of these provisions contemplate determination of the applicant's right to a license on facts related to his particular situation.

to imply a duty to promote competition throughout the broadcasting industry. It says (Rep. p. 82, R. 138):

> "The Commission's duty to act also flows from the fact that Congress expressly wrote into the act the requirement of free competition in the radio field. It provided in section 3 (h) that persons engaged in radio broadcasting should not be deemed common carriers. By section 313 it specifically made the antitrust laws applicable to persons engaged in radio communication and authorized the courts to revoke the license of any person found guilty of violating the antitrust laws. In section 311 it directed the Commission to refuse a license to any person whose license has been revoked by a court under section 313 and authorized the Commission to refuse a license to any person found guilty by a Federal court of having violated the antitrust laws with respect to radio communication. By section 314 it forbade persons engaged in radio communications from engaging in communication by wire, or vice versa, if the effect thereof is substantially to lessen competition or to restrain commerce. These elaborate provisions against restraints on competition leave no doubt that Congress intended to safeguard free competition in the radio broadcasting industry."

The Commission's thesis of a supposed duty with respect to competition is in fact the major premise of its Report, as we shall show in greater detail in Point Fourth (*infra*, pp. 71-76). (See particularly Rep. pp. 46-50, R. 102-106). But neither the sections cited, nor anything else in the Act, supports the regulations here involved.

Section 3(h) requires no discussion. It simply excludes broadcasters from the statutory definition of "common

carrier." It was only in connection with the distinction between Title II and Title III of the Act that this Court in the *Sanders Bros.* case used the expression, so persistently misapplied in the Commission's Report, that: "*Thus*, the Act recognizes that the field of broadcasting is one of free competition," (309 U. S., p. 474, *supra*, p. 23).

That expression did not mean that the Commission had either duty or authority to compel competition for its own sake. This Court (309 U. S., p. 475) after the passage earlier quoted that the Act does not "essay to regulate the business of the licensee" and that the "broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adaquacy of his equipment and financial ability to make good use of the assigned channel" proceeded (pp. 475-476):

> "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. *Congress intended to leave competition in the business of broadcasting where it found it*, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.
>
> "This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be

> left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service."

Thus the test is service to the listening public. The Commission is not to exercise its licensing function in such a manner as to impair the service to the listening public of a competent existing station just for the sake of creating a new and untried type of competition. And it should not be overlooked that there is a wide difference between the promotion of competition among stations which is inherent in the licensing of new stations, and attempting to promote competition among network organizations by regulation of the terms of network contracts. The power to license new stations is expressly given to the Commission, and the only question is whether such licensing in a particular case will serve the public interest, convenience or necessity in the statutory sense of this phrase. Here the Commission is not exercising its express power to license new stations. It is seeking to derive an implied power to regulate the terms of network contracts, which is no true exercise of its licensing power at all.

The right of "free competition" among stations which is preserved to the broadcaster by the Act involves the right, once licensed, to operate without governmental restrictions beyond those necessitated by technical requirements and general laws. If a station thinks that it can in the long run get a better or more diversified line of programs by affiliating with a network on the terms of the existing affiliation contracts, it is its right, subject to such laws, to do so. Any attempt by the *Commission* to restrict the business policies by which the station chooses the sources of its program material and otherwise conducts its operations would

be an unwarranted interference with its right freely to compete as contemplated by the Act.

The Commission concedes (Rep. p. 48, R. 104) the competition which exists between networks and between stations for advertisers and listening audiences. But it says, at the page cited:

> "* * * In the radiobroadcasting field, three different markets must be distinguished—the market in which networks and stations meet advertisers, the market in which networks and stations meet listeners, and the intermediate or internal market where stations meet networks. It is in this intermediate network-station market that current practices have most directly restrained competition; no considerations of the extent to which the networks may compete for advertisers or listeners can conceal the extent to which they do not compete in the network-station market."

But a theory that the Commission is entitled, by regulation or the use of its licensing power, to compel a larger measure of competition in what it calls the "network-station market", even at the expense of impairing the ability of the stations to compete most effectively in the other two markets which it recognizes, namely, the markets in which the stations compete for advertisers and for listeners, finds no support in the provisions of the Act, or the decisions of this Court construing it.

It being clear from the above that the Commission has no statutory duty or authority to exercise its licensing power so as to create new competitive conditions for network organizations, the remaining question is whether the statute gives it authority to deny renewals of licenses on

the sole ground that the applicants have engaged in practices which the Commission regards as restrictive of competition. The argument that it has, which the court below accepted, rests upon Sections 313 and 311. Section 314 is on its face so inapplicable to the subject-matter of the regulations here involved that it requires no discussion.

Section 313 (Appendix, p. ix) has no relation to the functions of the Commission. It speaks, not to the Commission, but to the Department of Justice, the Federal Trade Commission and the courts. It has nothing to do with licensing. Its first sentence, relied on by the Commission, reads:

> "Sec. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications."

That means that, if any person, licensed or unlicensed (like a network organization), infringes the anti-trust laws, it may be proceeded against by indictment or suit in equity at the hands of the Department of Justice or cease and desist proceedings at the hands of the Federal Trade Commission.

The second sentence of the section provides that whenever, in any such suit or proceeding, any licensee shall be found guilty of a violation of the anti-trust laws, "the Court, in addition to the penalties imposed by those laws, may decree that its license be revoked". The court below recognized (R. 486) that such a revocation was simply an additional punishment imposed by the court for "past mis-

conduct". The juxtaposition of this second sentence confirms, if confirmation be needed, our view of the meaning of the first sentence.

Section 311 (Appendix, pp. viii-ix) is the only provision in the Act, relating to monopoly or restraint of trade, which has any bearing on the Commission's licensing function. And its application is extremely limited. The first sentence of that section, which is the one presently material, reads:

> "Sec. 311. The Commission is hereby *directed* to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby *authorized* to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) *which has been finally adjudged guilty by a Federal court of unlawfully monopolizing, or attempting unlawfully to monopolize*, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition."

The first clause of that sentence, dealing with when the Commission is "directed" to deny a license, simply implements the authority given by Section 313 to a court to revoke a license as a part of the relief given in an anti-trust suit; and the second clause, stating the circumstances in which the Commission is "authorized" to deny a license, is limited to the case in which there has been an adjudication by a Federal court that the applicant has been guilty

of "unlawfully monopolizing, or attempting unlawfully to monopolize" or of using unfair methods of competition.

There has been no judicial determination that the provisions of the affiliation contracts which the Commission undertakes to proscribe are in violation of the anti-trust laws.*. The Department of Justice, the agency through which the anti-trust laws may, under Section 313, be applied to radio communications, has instituted suits against both Columbia and NBC and certain officers thereof, under the Sherman Act, Sections 1 and 2, to enjoin the defendants from continuing the very contractual provisions which the Commission here seeks to outlaw by indirection through regulations ostensibly directed at the stations (R. 284-300), but the suits have not yet reached trial.

If Congress had intended to give the Commission any power to deny a license in a case where it thought (in the absence of prior judicial determination) that the applicant had been guilty of unlawful monopoly or restraint of trade it would surely have said so. The authority embodied in the second clause would then have been wholly superfluous, for

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*The Commission does not even assert that in its judgment, if that were material, the conduct of the affiliated stations constitutes a violation of the anti-trust laws. It says (Rep. p. 83, R. 139):

"While many of the network practices raise serious questions under the antitrust laws [citing several decisions of the United States Supreme Court under the Sherman Act], our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals."

the case of an actual adjudication of monopolization would be *a fortiori*. Sections 311 and 313 together show that in Title III Congress gave considered attention to the bearing of the anti-trust laws upon broadcasting matters, and wrote out with discriminating care the instances and ways in which they bore on the Commission's functions and authority.

Our contention as to the true intendment of the first sentence of Section 311 is further fortified by the implications of the second sentence, that the granting of a license "shall not estop" the United States or any person aggrieved, from proceeding against a licensee for violation of the anti-trust laws. It is at least some indication that Congress did not expect the Commission in passing on license applications to concern itself with the question whether the applicant's activities amounted to monopolization or restraint of trade unless there had been a judicial determination to that effect.

The court below construed Section 311 as conferring authority on the Commission to deny a license if *it* found that the applicant had in the past been guilty of monopolization or restraint of trade, even though there had been no prior judicial determination of violation of the anti-trust laws. The court predicated this conclusion upon the following line of reasoning (R. 486-488): The provision of Section 313, that a court might impose the additional penalty of revocation of a license as part of an anti-trust decree, was not given as a means of compelling a licensee to furnish service free from unlawful restrictions, but to punish him for his past misconduct; on the other hand the provision of Section 311, that the Commission was "authorized" to refuse a license where there had been prior judicial

determination of violation of the anti-trust laws, was certainly not to be used as a punishment, since the Commission was not to overrule a court which had decided not to impose the penalty of revocation; the sole use which the Commission was to make of the prior adjudication was by considering it as evidence that, if granted a license, he would not use it for the "public convenience, interest, or necessity"; and so would be an unfit licensee.

Apart from the fact, above adverted to, that under the plain words of the statute a prior judicial determination was a prerequisite of the Commission's authority in this regard, it is clear that the above progression of reasoning is predicated, in part at least, on a misapprehension on the part of the court below of the changes which the Act of 1934 made in Section 13 of the Radio Act of 1927 which corresponded with Section 311 of the Communications Act of 1934 (Section 15 of the 1927 Act corresponding with Section 313 of the 1934 Act). It proceeded on the assumption that the 1927 Act contained no provision as to what the Commission might do if a court had adjudged an applicant guilty of violating the anti-trust laws, but had refrained from imposing the additional punishment of revocation of the license. The court below said (R. 487):

> "Section 13 of the Radio Act of 1927 had provided that if a court revoked a license, the Commission must refuse to renew it, but it had *stopped there*; and, as the law then stood, it might perhaps have been argued with some show of plausibility that an applicant's monopolistic or unfair competitive practices in the past were not relevant to the grant of a license.
>
> "However that may have been, § 13 was amended in 1934 by adding a *new* clause, and the resultant § 311, in addition to retaining the old language forbidding the restoration of a forfeited license, contained a new one providing that the Commission is

'authorized to refuse such station license' whenever the applicant had been 'finally adjudged guilty' by a Federal court of * * * attempting unlawfully to monopolize radio communication * * * or to have been using unfair methods of competition.'"

We print the full text of Sections 13 and 15 of the Radio Act of 1927 in the Appendix (pp. x-xi).

Actually Section 13 contained no provision dealing specifically with the case in which a court had revoked a license pursuant to the provisions of the second sentence of Section 15. That was not necessary because the first sentence of Section 13 "directed" (and not merely "authorized" as in Section 311) the licensing authority to refuse a station license to any person who had been finally adjudged guilty by a federal court of violation of the anti-trust laws, whether or not the additional punishment of revocation of the license had been imposed by the court. The changes which Section 311 of the 1934 Act made in Section 13 actually were that in the case of a prior adjudication of guilt, without imposition by the court of the additional penalty of revocation, the Commission was only "authorized", not "directed", to refuse the license; and to add the new provision that, where the court had decreed a revocation, the Commission was "directed", and not merely authorized, to refuse the license.

This shows that, contrary to the supposition of the court below, Congress in enacting the 1927 law had given considered attention to the situation where a court had adjudged a violation of the anti-trust laws, without revoking the license. But, more importantly, it shows that Congress had carefully reconsidered that question in passing the 1934 Act.

It is true that the 1934 Act accorded the Commission some discretion in that situation, whereas the 1927 Act had

given it none. But that discretion was a one-way discretion. The Commission might conclude that the applicant's past violation of the anti-trust laws did not show unfitness of a character which should disentitle him to a license. But it did not, any more than did the 1927 Act, give the Commission discretion to conclude that practices which it thought amounted to monopolization or restraint of trade, without more, made him unfit for a license, in the absence of prior adjudication of a violation.

The fact of prior judicial determination is a *sine qua non* under Section 311 of the 1934 Act just the same as it is under Section 13 of the 1927 Act. Despite the court's observation (R. 488) that the Commission was no more "profane" an agency than a court with which to "entrust" the "mysteries enveloping an adjudication of 'guilt' under the anti-trust laws", the fact remains that Congress deliberately chose the courts. The very fact that Congress in 1934 reconstructed Section 311 so as to give the Commission discretion to grant a license in spite of a prior adjudication, but not to refuse one in the absence thereof, is eloquent of that intent.

Such intent is furthermore amply demonstrated by the legislative history of these sections as a whole. We have heretofore pointed out that prior to the introduction of H. R. 9971, which, as amended, became the Radio Act of 1927, several bills were introduced in Congress to amend or supplement the Radio Act of 1912 under which the allocation of frequencies was the responsibility of the Secretary of Commerce.* In these earlier bills Sections numbered

*Some of such early bills were: H. R. 13773, 67th Cong., 4th Sess. (1923); H. R. 11964, 67th Cong., 2nd Sess. (1922); H. R. 7357, 68th Cong., 1st Sess. (1924).

2(C) and 2(G), respectively, corresponded in content to Sections 13 and 15 of the 1927 Act. Section 2(G) involved no controversy and was always in substantially the same language in which it now appears in Section 313 of the 1934 Act. But Section 2(C) of the bills would have provided that the Secretary of Commerce should be authorized to deny a license when "in his judgment" the applicant was unlawfully monopolizing, rather than this subject being left to judicial determination.

All of the early bills failed of adoption. Secretary Hoover opposed the features thereof which committed administrative discretion to the Secretary. (See Report of Hearings before House Committee on Merchant Marine and Fisheries on H. R. 11964, 67th Cong., 4th Sess. (1923), p. 40). It was, however, in his remarks at the hearings on H. R. 7357 that his ideas on the subject were more fully developed. He said (Report of Hearings before House Committee on Merchant Marine and Fisheries on H. R. 7357, 68th Cong., 1st Sess. (1924), at p. 11):

> "* * * The determination of whether or not a given concern is attempting to set up an illegal monopoly in radio communication is dependent upon the ascertainment of a vast number of facts, and the determination of difficult legal questions. We have a conflict between the general American principle of opposition to monopoly and an equally American principle, recognized by our patent laws; that an invention belongs exclusively to him who makes it, which necessarily means an exclusive right in the inventor. The problem does not properly belong to *any* administrative body.
>
> "The Department of Commerce has no machinery with which to carry on the investigations nec-

essary, nor is its organization suited for the decision of such questions.* I much prefer the principle adopted in Section 2 (g) [permitting revocation of a license as part of the penalty upon judicial determination of violation] under which the law and facts applicable are determined judicially, and I would suggest that the bill be so amended that the refusal of a license to a monopoly be placed upon the same basis, and determined in the same manner as is the revocation of a license under this section."

Solicitor Davis of the Department of Commerce expressed similar views. (Report of Hearings before House Commit-

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*In the debates and hearings with respect to these bills many alleged evils were discussed, to all of which the term "monopolizing" was generally applied. Besides the interference problem of powerful stations operating in chains, which, as already pointed out, was the occasion for the enactment of Section 4(h) of the 1927 Act corresponding to Section 303(i) of the 1934 Act, other such evils to which Congress paid predominant attention were: (1) the pooling of patents for radio tubes and equipment by American Telephone & Telegraph Company, General Electric Company, Radio Corporation of America and certain other companies and the division among those concerns of the various functions in the radio industry, and the resulting high prices for radio sending and receiving equipment; and (2) the possibility that station licensees, by mere use of a particular frequency or wave length, would thereby acquire some vested interest or ownership therein, resulting in a perpetual "monopoly" by the first users of the few available wave lengths. (As to (1) see Report of Hearings before House Committee on Merchant Marine and Fisheries on H. R. 7357, 68th Cong., 1st Sess. (1924), pp. 40-49, 95-98; House Report No. 719, 68th Cong., 1st Sess. (1924), pp. 4-5; 68 Cong. Rec., 69th Cong., 2d Sess. (1927), 2579. As to (2) see *Tribune Co.* v. *Oak Leaves Broadcasting Station, Inc.* (unreported decision by Circuit Court, Cook County, Ill., Nov. 1926) holding that prior use of a particular wave length gave the user the right to be free from interference by later users; 15 Georgetown L. J. 474 (1937) and reference to case by Congressman White, 68 Cong. Rec., 69th Cong., 2d Sess. (1927), 2579).

tee on Merchant Marine and Fisheries on H. R. 7357, 68th Cong., 1st Sess. (1924), p. 210).

In the 69th Congress, 1st Session (1925), a radio bill, (H. R. 5589) was introduced in the House, and two other radio bills (S. 1 and S. 1754) were introduced in the Senate. Both H. R. 5589 and S. 1754 contained a provision complying with Secretary Hoover's suggestion. As to this the following colloquy occurred between Solicitor Davis of the Department of Commerce and members of the Senate Committee on Interstate Commerce, particularly Senator Dill (Report of Hearings Before Senate Committee on Interstate Commerce on S. 1 and S. 1754, 69th Cong., 1st Sess. (1926), p. 108):

> "Mr. Davis. Beginning on page 7 there is what might be called an antimonopoly clause, a provision that no radio license shall be granted to any person, firm, company, or corporation or any subsidiary thereof, that has been convicted in any court of the United States of unlawfully monopolizing or attempting to monopolize radio communication. That clause has received a good deal of consideration before the House committee. I have nothing in particular to say about it.
>
> "Senator Dill. You do not object to it?
>
> "The Chairman [Senator Watson]. Well, do you approve it?
>
> "Mr. Davis. I see no objection to it. It is, you will observe, an extremely stringent provision, in that, if I may express it that way, there is no opportunity for repentance; the corporation having been once found guilty is forever debarred from obtaining a license, although it may have ceased from its unlawful practices.
>
> "Senator Smith. Have you known many cases where they did cease?

"Mr. Davis. I think that under the Federal Trade Commission provisions, where they issue cease and desist orders they have been ceasing, yes; but anyway that is the effect of that provision.

"Senator Dill. *Well, it does not apply until they have been actually convicted?*

"Mr. Davis. It does not apply until they have been actually convicted."

Efforts to get into the Radio Act of 1927 a provision authorizing the Radio Commission, thereby constituted, to refuse a license when in the judgment of the Commission the applicant had monopolized or restrained competition, were also rejected. The report of the House Committee on Merchant Marine and Fisheries with respect to H. R. 9971 (House Report No. 464, 69th Cong., 1st Sess. (1926)), contains a lengthy minority report by Congressman Ewin L. Davis, making numerous charges of monopoly in the radio industry. It pointed out that

> "there is no provision in the bill as reported prohibiting or guarding against the issuance or renewal of licenses to parties unlawfully monopolizing or attempting to unlawfully monopolize radio communication, etc., unless and until such party shall have been found guilty thereof by a Federal court"

(*id.*, p. 15), and made specific recommendations (*id.*, p. 22). In the course of these it said:

> "* * * It surely will not be contended that the United States should license applicants to continue to violate its laws."

an idea very similar to that expressed in the Report of the Commission (pp. 82-83, R. 138-139):

> "* * * We cannot believe that Congress intended to leave us powerless to deal with restraints which might fetter the free competitive field it sought to maintain or to require us to promote unlawful conduct by our own affirmative action."

In the course of the debates Congressman Davis said:

> "And yet this Sixty-Seventh Congress bill [H. R. 13773] directly and specifically authorized the Secretary of Commerce upon his own responsibility to refuse a radio license to any person or corporation, who in his opinion was directly or indirectly monopolizing or attempting to monopolize radio communication or any phase of the radio industry. That provision has been radically weakened. It has had the teeth pulled out of it as modified in the bill which you now have under consideration, because it provides that the license shall be refused in case of a monopoly only when a Federal court authorized to act shall have specifically determined hereafter, and upon facts occurring after the passage of the bill, that the applicant is violating those antitrust laws." (67 Cong. Rec., 69th Cong., 1st Sess. (1926), p. 5481.)

Thereafter, Congressman Davis proposed amendments (67 Cong. Rec., 69th Cong., 1st Sess. (1926), pp. 5502, 5561) to provide for the refusal of a station license to anyone found by the *Commission* to have been "unlawfully monopolizing" radio communication or otherwise violating "the laws of the United States against combinations, contracts, or agreements in restraint of trade." These amendments were rejected by the House (*id.*, pp. 5555, 5563).

That the Senate, as well as the House, understood exactly what was proposed in the bill is shown by a colloquy

between Senator Dill and Senator Pittman during the Senate debate. It is as follows (68 Cong. Rec., 69th Cong., 2nd Sess. (1927), p. 3034):

> "Mr. Pittman. I understand; but it is evident that the House did not intend that the commission to be appointed under this bill should have the determination of the question as to whether there was a monopoly existing or whether there were overcharges or whether there were discriminations, and the reasons why they expressly left that out was because there were two bodies, each dealing with those subjects.
>
> "Mr. Dill. The Senator is correct in that."

The Commission says (Rep. pp. 46-47, R. 102-103) that "In the *absence* of Congressional action *exempting* the industry from the antitrust laws, we are not at liberty to condone practices which tend to monopoly and contractual restrictions destructive of freedom of trade and competitive opportunity." This is to construe the standard of "public interest, convenience, or necessity", enacted by Congress to guide the exercise by the Commission of its delegated functions with respect to the subject matter of this particular act, as including a mandate to enforce, by denial of licenses, every general federal statute. There is, for example, no provision in the National Labor Relations Act, the Fair Labor Standards Act, the Securities and Exchange Act, or many other general laws, "exempting" the broadcasting industry from their operation. Does the Commission conceive itself to be authorized by the Communications Act of 1934 to promulgate general regulations that no station shall under any circumstances be granted a renewal of its license if it refuses to bargain collectively with its employees, or

pays them substandard wages, or floats a security issue on a misleading prospectus? And if not, why not? The statutes referred to express the judgment of Congress with respect to *general* public policy as impressively as do the anti-trust laws, and infraction of them could be made to appear as cogent evidence of unfitness for a license as the reasoning whereby the Commission's report here concludes that those who violate the letter or spirit of the anti-trust laws are unfit. The fact that there are other administrative agencies charged with the enforcement of those laws, just as the Department of Justice and the Federal Trade Commission are charged with responsibility for the due execution of the anti-trust laws, would make no difference.

Such a construction of the standard of "public convenience, interest, or necessity" as "a mere general reference to public welfare", without limitation to the particular category of public welfare which was committed to this Commission's administration, is contrary not only to the general rules laid down by this Court for the construction of that phrase (*supra*, pp. 42-43), but to their particular application in the *Sanders Bros.* case.

THIRD: The Commission has no authority under the Act to promulgate a regulation providing for the denial of renewals of licenses to network-operated stations deemed by it to be in an unduly favorable competitive position.

Only the licensing power is involved in the subject of this point, and the only pertinent question under it is as to the asserted authority of the Commission to deny licenses solely for the purpose of promoting competition. No appli-

cation of any supposed principles of licensee responsibility or maximum use of facilities are involved.

Regulation 3.106 is the logical extension to stations owned and operated by network organizations themselves of the Commission's theory that it has not only authority, but duty, to deny a license to any station whose operation in its judgment tends to discourage competition. The standard which it makes the all-controlling one with respect to network-operated stations is whether the existing stations in the locality served are few or unequally desirable in terms of coverage, power, frequency, or other related matters. It should be observed *in limine* that the inequalities in those respects which may exist in any locality may not be assumed to be without justification. Columbia's station in Charlotte, N. C., which the Report (p. 68, R. 124) says is one where no network ownership should be allowed, was acquired by Columbia in 1929, and those in Minneapolis and Washington, D. C., which the report says (*ibid.*) raise serious doubts, were acquired by it in 1931 and 1932, respectively.

The question of the extent to which considerations relating to competition may, consistently with the provisions of the Act, enter into the Commission's determination on licensing applications has been fully discussed in the preceding point, and need not be repeated here.

The chief difference between 3.106 and the other regulations is that 3.106 contemplates a hearing on the case of each particular network-operated station which is an applicant for a renewal, and that in the hearings on the applications of some at least of such stations there will be some factual issues to be tried. But 3.106 none the less requires that the determination depend upon a single fact, namely,

whether the facilities in the locality are so few or so unequal that competition is substantially restricted. The only difference is that, whereas under regulations 3.101 to 3.105, inclusive, denial is automatic once the existence of an affiliation contract containing one of the proscribed provisions appears, under 3.106 the question of whether the relative desirability of the existing stations is actually so unequal that competition would be substantially restrained is open. But that is all that is open. The considerations which Section 308 (b) indicates are the primary qualifications for a license,—character, financial and technical ability and probability of commanding programs that will give satisfaction to the listening audience,—are as irrelevant as they are under the other regulations. In fact, marked superiority of ability to serve the listening public, from the point of view of coverage, power, frequency and related matters, becomes a reason for refusing, rather than granting, a renewal of the license. As to the Charlotte station, at least, the issue is so far predetermined that the Commission is able to announce in its report that no renewal of its license can be expected.

We submit that such a regulation is no more an authorized exercise of the licensing power than are those which predetermine adversely to the affiliated stations their right to renewal of their licenses.

FOURTH: Even if the subject-matter of the regulations were deemed to be generally within the authority of the Commission under the Act, the order promulgating them must nevertheless be set aside because predicated upon an erroneous interpretation by the Commission of the extent of its power and duty with respect to the promotion of a new kind of competition in the broadcasting industry.

Under all of the authorities construing the Act the statutory standard of "public convenience, interest or necessity", which is the "touchstone" for the exercise of the Commission's authority, means the convenience, interest and necessity of the listening public. All other considerations, including those relating to general public interest, must be subordinated to that. The Commission in parts of its Report pays lip-service to that principle. But we submit that the Report as a whole shows clearly that the predominant purpose of the Commission was to fulfill what it regarded as its duty to create new competition in the broadcasting industry.

If the Commission did subordinate considerations affecting the interests of the listening public to this supposed duty, it failed to discharge its delegated functions under the Act, and its order should be set aside, with perhaps a direction to the Commission to reconsider on correct principles.

At the opening of division VII, which immediately follows the factual discussion in its Report, the Commission says (Rep. p. 46, R. 102):

> "'The Communications Act 'recognizes that the field of broadcasting is one of free competition.'

[citing *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474, (*supra*, p. 22)] * * *

"It has long been a basic hypothesis of the American system that competition in a free market best protects the public interest. This hypothesis, moreover, has been given the force of law throughout the entire field of interstate commerce. For more than half a century contracts and combinations in restraint of trade, and monopolization or attempted monopolization of interstate commerce, have been outlawed.[3] The fundamental purpose of this legislation is 'to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade.'[4] The Sherman Act was enacted 'to preserve the right of freedom to trade'[5] and it is 'based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition.'[6]

"The prohibitions of the Sherman Act apply to broadcasting.[7] This Commission, although not charged with the duty of enforcing that law, *should administer its regulatory powers* with respect to broadcasting *in the light of the purposes which the Sherman Act was designed to achieve.* * * *"

The above references in footnotes 3, 4, 5 and 6, are to quotations from the Sherman Act, and to decisions of the Supreme Court of the United States construing it, and in footnote 7 to quotations from Section 313 and Section 3 of the Communications Act. The general discussion in this division ends with the sentence (Rep. p. 50, R. 106):

"Pursuant to the mandate of Congress that it grant licenses and renewals only to stations operating in

> the public interest, this Commission must refuse further to license stations which persist in these practices."

The Commission did not predicate its order merely upon a belief that it was entitled to consider the public policy underlying the antitrust laws in discharging its delegated functions under the standard of "public interest, convenience, or necessity". Its Report shows that it believed itself to be under an inescapable statutory *duty* to compel in the broadcast field "the fullest measure of competition possible within physical limitations" (Rep. p. 88, R. 144); that such statutory duty was so imperative that it must be discharged regardless of its effect upon the industry and concomitantly upon the listening public; and so controlling that it overbalanced all other factors comprising the standard.

The Commission stated its thesis as follows (Rep. pp. 46-47, R. 102-103):

> "* * * In the absence of Congressional action exempting the industry from the antitrust laws, *we are not at liberty* to condone practices which tend to monopoly and contractual restrictions destructive of freedom of trade, and competitive opportunity. *Had we liberty in this regard* we *should* require a very clear showing that such pr ices or restraints, because of conditions peculiar t the industry, promote the *best interests of the listening public.* * * *"

The meaning of this is unmistakable. The Commission did not regard itself as at liberty to give consideration to the question whether the contractual provisions which it condemned might on the whole be beneficial rather than detrimental to "the best interests of the listening public", and therefore indicated that it had not made any considerable inquiry into that question.

The above quotation is followed by a sentence which is inconsistent both with what precedes and what follows it in the Report, as well as with the action which the Commission actually took. It reads (Rep. p. 47, R. 103):

> "* * * In any event, preservation of the fullest possible measure of competitive opportunity consistent with furnishing the public adequate broadcasting service is *one of the elements* to be considered in applying the statutory standard of 'public interest, convenience, or necessity.'"

The phrase "the fullest possible measure of competitive opportunity consistent with furnishing the public adequate broadcasting service" is inconsistent both with the two sentences which precede it and with the phrase which we have above quoted from R. 144 that "The Congress * * * has required the fullest measure of competition possible within *physical* limitations". And the statement that preservation of competitive opportunity is "one of the elements" to be considered in applying the statutory standard of "public interest, convenience, or necessity" is inconsistent with the text of the regulations that "No license shall be granted to a standard broadcast station" (no matter how demonstrably that station satisfies all other component elements of the statutory standard) which has a contract with a network organization containing one of the proscribed conditions. That this consideration was intentionally made the sole test is demonstrated by the concluding paragraph of the pages of division VII. which introduce the discussion of the particular contractual provisions (Rep. p. 50, R. 106):

> "A constantly improving service to the public *requires* that all the competitive elements within the industry should be preserved. The door of oppor-

> tunity *must* be kept open for new networks. Competition among networks, among stations, and between stations and networks, all of which profoundly affect station service, *must* be set free from artificial restraints. It is not in the public interest for any licensee station to make arrangements which tend to close that door or restrain that competition. *Pursuant to the mandate of Congress* that it grant licenses and renewals only to stations operating in the public interest, this Commission *must refuse* further to *license stations which persist in these practices.*"

And that this determination to deny licenses to all stations having affiliation contracts with national networks of the sort here involved, regardless of the particular conditions,—even competitive conditions,—in which such stations operate, or the effect of the affiliation provisions upon the interests of the listening public in particular localities of varying character, is shown by contrast with the Commission's treatment of stations having similar or identical contractual relations with regional, as distinguished from national, networks. After saying that "the regional networks are in a state of more rapid flux than the national networks", the Commission said (Rep. p. 77, R. 133):

> "* * * Accordingly, we will carefully consider, in particular instances, any showing that the application of the regulations herein adopted to a station affiliated with a *regional* network will reduce rather than increase its ability to operate in the public interest."

It is not necessary to quote further from the introductory pages of division VII, nor extensively from the matter in the several subdivisions which discuss the particular con-

tractual provisions which the Commission condemns. It is fair to say that the discussion, taken as a whole, shows that the Commission conceived its duty as one to compel a particular type of competition for its own sake. Even in those passages in which the Commission purports to present the alleged advantages of introducing a larger measure of competition into the broadcasting industry, it is quite plain that it refers primarily, if not exclusively, to the general public policy favoring the competitive system which forms the basis of the Sherman Act. Its generally stated conclusions that the several network practices which it condemns do not serve "the public interest" (Rep. pp. 57, 59, 62, 65, 68, 73, 75, R. 113, 115, 118, 121, 124, 129, 131) are either mere assertion, or rest ultimately on the Commission's hypothesis that that must be so because they in some measure restrain competition. The same thesis is the foundation of the Commission's discussion of "Jurisdiction" in division VIII. And in division IX, entitled "Conclusion", the final sentences are (Rep. pp. 88-89, R. 144-145):

> "* * * If the industry cannot go forward on a competitive basis, if the substantial restraints upon competition which we seek to eliminate are indispensable to the industry, then we must frankly concede that broadcasting is not properly a competitive industry. If this be the case, we recommend that the Congress should amend the Communications Act to authorize and direct regulations appropriate to a noncompetitive industry with adequate safeguards to protect listeners, advertisers, and consumers. We believe, however, that competition, given a fair test, will best protect the public interest. That is the American system."

Even if the Court should not accept to the full our argument under Point Second, it is at least clear, we submit, that

the Commission's conception of the size of its power, and duty, under the Act, as evidenced by the above-quoted passages from its Report, is untenable. The same passages, and the Report as a whole, show equally clearly that the Commission would never have ordered the regulations which it did except for that erroneous conception.

The law is established that an order so based may not be permitted to stand. This is true, even though, if the same result had been reached by the Commission by application of valid principles (which, we submit, could not have been the case here), it would have been unassailable under the doctrine of administrative finality.

The case of *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, is squarely in point. That involved an order of the Interstate Commerce Commission condemning existing rates on deciduous fruits. This Court found (p. 665) that the opinions of the Commission showed "quite plainly that the commission based the order entirely upon" a joint resolution, known as the Hoch-Smith Resolution, which purported to declare "the true policy in rate making" in various respects, among others, that "in view of the existing depression in agriculture, the commission is hereby directed to effect * * * such lawful changes in the rate structure * * * as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service." This Court found that the Commission construed the above language as making a change in the basic law of rate-making to place agricultural products in a "most favored" class. Although the Commission made a finding that the existing rates were "unreasonable", this

Court found from the Commission's opinion as a whole that what it meant by that was that the rates were unreasonable under the joint resolution and not under the applicable sections of the Interstate Commerce Act. Holding that the Commission's interpretation of the joint resolution was erroneous, this Court concluded that its order must be set aside.

In *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, it appeared that the Interstate Commerce Commission reduced a reasonable rate on the ground that the railroad was estopped to charge a rate in excess of that which had been in force for many years and upon which certain lumber interests had relied. Again the order of the Commission was in form within its powers, but this Court went behind the form and held that the Commission had adopted its order on an erroneous principle and set it aside.

In *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, the Interstate Commerce Commission made an order requiring import traffic transported to any place in the United States from a port of entry to be taken at the inland tariff governing other freights. In support of its order the Commission stated that it was its duty so to construe the Act as to make it practically correspond with what was assumed to be the policy of the tariff laws. This Court held that the Commission had exceeded its jurisdiction and, with respect to the Commission's reliance upon the policy of the tariff laws to support its decision with respect to discrimination, said (p. 221):

> "Our reading of the act does not disclose any purpose or intention, on the part of Congress, to thereby reinforce the provisions of the tariff laws."

In the recent case of *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, this Court was unable to ascertain from the report of the National Labor Relations Board whether it had found that a certain bulletin and speeches coerced the company's employees, or had merely taken into consideration the bulletin and speeches together with other circumstances in finding coercion. This Court held that if the Board acted solely on the basis of the coercive effect of the bulletin and speeches, its decision was a violation of the employer's right of free speech guaranteed by the First Amendment. It therefore remanded the case to the Board for a redetermination of the issues in the light of its opinion.

In all these cases, the commission or board possessed express statutory powers to determine the ultimate subject of their orders. Nevertheless, when it appeared that the commission or board had exercised its power by the application of erroneous principles, the orders were set aside.

FIFTH: If the Communications Act were construed to authorize the Commission to make the order here in question, it would be unconstitutional.

a. Invalid Delegation of Legislative Power.

The Commission's effort to accommodate an order having the purpose and effect of that here in question to the scope of the authority committed to it by the Communications Act leads it into a dilemma. If the Act is construed to limit the elements which the Commission is entitled to consider under the standard of "public convenience, interest, or necessity" to those which are expressly stated or reasonably to be in-

ferred from the context in the Act, then the Commission is not vested with authority extensive enough to support the order which it has made. If, however, the phrase "public convenience, interest, or necessity" is given so latitudinarian a construction that power of the breadth here invoked by the Commission is to be deemed comprehended within it, then the standard for administrative action would be so vague and indefinite as to violate constitutional limitations.

The general principle that Congress is not permitted to transfer to administrative agencies the essential legislative functions with which it is vested by Article I, Section 1, of the Federal Constitution, and that such an invalid delegation exists where Congress fails to express a sufficient definition of standards to govern the administrative action of the agency, is established beyond question. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495.

The validity of the Radio Act of 1927 was upheld *because* the criterion of public convenience, interest or necessity was not taken as "a mere general reference to *public welfare* without any standard to guide determinations" (see *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24), or "as setting up a standard so indefinite as to confer an unlimited power" (*Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285). See *supra*, p. 42; see also the passages in the opinions in the *Panama* case, 293 U. S., p. 428, and the *Schechter* case, 295 U. S., p. 540, distinguishing the Radio Act.

But, if the construction of the standard now attempted by the Commission were upheld, there would be no discernible limit to the sweep of its authority.

There is nothing in the case of *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, which justifies the appellees' contentions. The standards referred to by this Court (pp. 574-577) are far more precisely stated than the standard which the Commission's attempted interpretation of the Communications Act would imply. The sections of the Agricultural Marketing Agreement Act of 1937, in which they were contained, are quoted in the margin of pages 542-545 of the opinion. The standard which the Commission would administer under the Communications Act, if the interpretation asserted by it were accepted, would much more closely resemble the declaration of policy which was held insufficient in the *Schechter* case, and which this Court in the *Rock Royal Co-operative* case quoted in the margin of page 575. The Court said (307 U. S., pp. 575-576):

> "* * * In the Recovery Act the Declaration of Policy was couched in most general terms. In this Act it is to restore parity prices, § 2. Under the Recovery Act, general welfare might be sought through codes of any industry, formulated to express standards of fair competition for the businesses covered. Here the terms of orders are limited to the specific provisions, minutely set out in § 8c (5) and (7). While considerable flexibility is provided by § 8c (7)(D), it gives opportunity only to include provisions auxiliary to those definitely specified."

In fact, the power which the Secretary of Agriculture was to exercise under the Agricultural Marketing Agreement Act of 1937, involved in the *Rock Royal Co-operative* case, was far more akin to the kind of power exercised by the Interstate Commerce Commission in fixing reasonable rates, and in establishing divisions of joint rates under the Trans-

portation Act of 1920, than it is to application of the standard of "public convenience, interest, or necessity" under the Communications Act. *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 462, is also of that nature.

In the recent case of *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, this Court in reviewing the constitutionality of the Fair Labor Standards Act of 1938 described the essentials of the legislative function as follows (p. 145):

> "* * * The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective."

We are here dealing with regulations prescribing the terms upon which a station may contract for network service. Congress has not established any legislative policy with respect to those terms. The rules which the Commission has applied in this case are not set forth in any provision of the statute. They have been manufactured by the Commission without any guide from Congress. The Commission says (Rep. p. 46, R. 102): "The prohibitions of the Sherman Act apply to broadcasting", but it does not apply the standards of the Sherman Act and determine whether the contracts are in unreasonable restraint of trade. It invents a new standard of competition which disregards the element of reasonableness, and which may include within the proscribed class of contractual provisions even those which do not offend the Sherman Act. The Commission says (Rep. p. 66, R. 122): "The licensee him-

self must discharge the responsibilities imposed by the law." But nowhere in the law can any standard be found for judging the terms of network contracts in the light of licensee responsibility. The Commission invents the principle of maximum use of facilities and then determines on its mere say-so that terms of network contracts violate this standard. It is apparent that, on the Commission's interpretation of the Act, Congress has not specified the basic conclusions of fact upon ascertainment of which, from relevant data, a statutory command with respect to the terms of network contracts is to be effective.

If "public convenience, interest, or necessity" be so construed as to authorize the Commission to prescribe the terms of network contracts, the statute is unconstitutional in that it does not prescribe any rule by which the terms of these contracts are to be judged.

b. The First Amendment.

We submit that if the Act were construed to authorize the Commission to promulgate the regulations here in question, it would be unconstitutional as an abridgement of the freedom of speech and of the press in violation of the First Amendment to the Constitution.

There can be no question that communication by radio broadcasting is within the scope of the guaranties of freedom of speech and of the press. Every broadcasting station is an important instrument of dissemination of news, ideas, and discussion. Radio broadcasts are more largely relied on by the people as a source of news even than the newspapers (*supra*, p. 14). "The press in its historic connotation comprehends every sort of publication which affords a

vehicle for information and opinion". *Lovell* v. *Griffin*, 303 U. S. 444, 452.

Even if the regulations here involved had stood in the form in which they were first proposed (*supra*, p. 39) they would have violated the constitutional guaranty. The court below recognized (R. 490) that "it is not necessary for a law directly to control the substance of an utterance for it to invade the right of free speech"; and that regulations forbidding stations to make contracts with networks, even though they believe that this will bring them better programs than they can get in any other way, are such an interference since they "fetter the choice of the station".

But the form in which the regulations were finally promulgated involves an additional vice, arising from the nature of the penalty which they impose upon a station which refuses to accede to the Commission's attempted curtailment of their freedom to make such contracts as they deem advisable to insure a supply of material for publication and a wide circulation therefor. That penalty is that the station be put off the air. The Commission's order is thus an undisguised attempt to enforce submission to a governmental edict by threat of suppression of publication.

In addition to the stations, Columbia itself as a network organization is, we submit, an important vehicle of free speech which is entitled to the protection of the First Amendment. Many of the outstanding programs, especially those of news, news analysis, discussion of public questions and special events of public importance in many parts of the world, are of network, rather than station, origin. Columbia is thus as much a publication as a newspaper or national magazine. Its owned and affiliated stations are its outlets for the dissemination of news, information and ideas.

Except for the physical fact that the number of frequencies is limited, there would have been neither occasion nor excuse for denying to anyone this new vehicle of communication. A law providing that no newspaper could be published except under license would be void on its face. From the point of view of freedom of speech, the grant of a broadcasting license is not to be regarded as the conferring by Government of a privilege, in any such sense as to validate subjecting it to conditions of all kinds. It is rather the recognition of a right, subject only to the qualification that an equal right cannot be conferred on everyone. But for that fact, there would be no reason why the broadcasting business should not be as open to all comers as the newspaper business, why there should be any greater restriction on communication by radio than by pamphlets and handbills, or hiring a hall or mounting a soapbox in a public park; an attempt by Congress to impose any restriction would involve constitutional questions of the gravest character.

It follows that this fundamental, constitutional limitation must greatly confine, even if the terms of the Act did not confine, the conditions which the Commission could validly place upon the grant of a license, or the renewal of one. They must, we submit, have some demonstrable, and not merely remote, relation to the problem which alone furnishes the justification, namely, that if everyone who wished to broadcast by radio were permitted to do so, the resulting "confusion and interference" would be such that the listening public would be able to hear no one.

Apart from this we submit that it is essential that any statute purporting to restrict the exercise of the rights of free speech and of free press specify with particularity the conditions of the restriction. Granted that these rights

"are not absolutes to be exercised independently of other cherished privileges, protected by the same organic instrument" (*Jones* v. *Opelika*, 316 U. S. 584, 593), the necessity for particular definition of the proposed restriction arises, if from nothing else, because without it the courts have no basis for resolving the "conflicts in the exercise of rights" (*ibid*) as between the interest of preserving freedom of speech and of the press on the one hand, and the asserted over-balancing interest on the other. It is the unpredictability of the exercise of power by a licensor which makes an unlimited licensing system intolerable in the area of free speech and a free press (see *Lovell* v. *Griffin*, *supra*, 303 U. S., p. 451). Even where circumstances compel or justify the exaction of a license upon vehicles of expression, the licensee must never hold his license at the whim of Government.

Applying these unquestioned principles to the instant case, a construction of the Communications Act limiting the conditions upon which broadcasting licenses may be denied or revoked to those announced by this Court in the *Sanders Bros.* case (*supra*, pp. 22-23) raises no issue of free speech. But a construction of the Act which would confer upon the Commission as undefined a power to deny or revoke as that which alone could support the regulations here in question would be obnoxious. If the Commission can today make the existence of provisions which it deems objectionable in an affiliation contract a sole controlling ground for denial of licenses to hundreds of affiliated stations, it may tomorrow make some other entirely different fact such a single controlling ground. Such unpredictability of action on the part of a Commission endowed with a life or death power over licensed stations could only result in the licensees living in such a constant state of fear that they would not dare

oppose the merest intimation from the Commission of its desires on any subject. Regulation by the nod or frown of a licensor was the essence of the very evil against which the First Amendment was adopted as the safeguard.

The above argument involves no question as to the extent to which broadcasters, like other instrumentalities of free expression, are subject to general laws. This Court held in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, that the Associated Press was subject to proceedings under the National Labor Relations Act for discharging an editorial employee on the sole ground of his union activity and agitation for collective bargaining. But nothing in the opinion suggests, and we are confident that this Court would not hold, that a law making such an offense a sufficient cause for prohibiting the continued publication of the newspaper could possibly be sustained. The distinction between punishment for unlawful acts and restraints upon publication is fundamental (*Near* v. *Minnesota*, 283 U. S. 697, 713-715; *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State* (*Town of Irvington*), 308 U. S. 147; *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496). An essential ground of the opinion of the majority of this Court in *Jones* v. *Opelika*, *supra*, was that no contention was made by the petitioners that the effect of the tax there in question was so large as to operate as a substantial deterrent to the distribution of their literature (316 U. S., pp. 592-593; *cf. Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233).

The court below, as we have said, agreed that the regulations amounted to an impairment of freedom of speech. The sole reason which it gave for its conclusion that no problem under the First Amendment is presented, was that "the interests which the regulations seek to protect are the

very interests which the First Amendment itself protects, i.e. the interests, first, of the 'listeners,' next, of any licensees who may prefer to be freer of the 'networks' than they are, and last, of any future competing 'networks' ".

We submit that an actual abridgement of freedom of speech can never be justified on the sole ground that the perpetrator thereof believes that the ultimate result of the suppression will be to permit freedom of expression by a larger number of persons. Such a conclusion would open too easy avenues for evasion of the constitutional guaranty. But, if such belief ever can be a justification, at least something akin to a demonstration of its validity should be required. Here whether such would be their effect is wholly speculative. It is our contention that the effect would be the exact opposite, since abrogation of network practices, which experience has shown to be the only practicable method for obtaining commitments from advertisers, which in turn are the sole support not only of the commercial but of the sustaining programs as well, would so strike at the economic foundation of the broadcasting industry as to impair gravely its ability to continue as an effective agency of publication. The Commission Report expresses an opinion to the contrary. But, as the court below said in another connection (R. 491), its findings "are necessarily prospective: time alone can decide their success or their failure"; and even the opinions of those who are steeped in the details of the business "must be largely speculation".

We submit that the profession of such opinions, necessarily incapable of demonstration, cannot excuse infringements of freedom of speech which are present, tangible and drastic.

SIXTH: The regulations are arbitrary and capricious.

For purposes of the argument in this point we assume that the Act gives to the Commission authority with respect to the matters with which the regulations deal. Nonetheless, we submit, the regulations are arbitrary and capricious because not a reasonable exercise of the Commission's power to grant or deny licenses in accordance with the statutory standard of "public convenience, interest or necessity".

There is no rational basis for making a single fact, like the presence in an affiliation contract of an objectionable provision, the sole determining factor in all applications. The court below misapprehends the grounds upon which inflexible and undiscriminating regulations upon such a subject may be challenged. It says (R. 488) that acceptance of our position "would go far to destroy the power to make any regulations at all". Clearly it does no such thing. Everything depends upon the subject-matter of the regulations in question. There are many subjects on which general regulations are an entirely reasonable exercise of the Commission's power. Technical and engineering standards, for example, may of course properly be made applicable to all stations in the same general category. But as to licensing, it is the duty of the Commission to weigh and balance in relation to each other all of the many elements which for purposes of this argument we assume may be comprehended within the standard of "public convenience, interest, or necessity" as they bear upon the best service to the listening public. The inherent nature of that duty is such that it can be reasonably discharged only in the light of the situation of each individual station

and the audience which it serves. The court below said (*ibid*) that it could not "see the advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future". But a rational application of the statutory standard would preclude making the Commission's action on one station a precedent for its action on another, except to the extent that the considerations which impelled a certain action in the case of the one were duplicated in that of the other, and were not counterbalanced by those wherein the two differed.

The Commission pays tribute (Rep. p. 4, R. 60) to the benefits that the existing system of network broadcasting has brought to the industry and concomitantly to the listening public throughout the nation. It professes (Rep. pp. 88-89, R. 144-145) solicitude that this structure should not unnecessarily be impaired and expresses the opinion that the regulations would not have that result. But its Report discloses no realistic consideration of the facts (*supra*, pp. 13-18) upon which appellant predicates its belief that the natural consequence of enforcement of the regulations will be disintegration. And, as we have pointed out in Point Fourth (*supra*, pp. 71-77) the reason why such consideration was not given is that the Commission regarded its supposed duty to create new forms of competition as the more compelling one.

Even upon such an assumption, however, a Commission exercising reasonably its licensing functions would have weighed at least the competitive conditions surrounding the cases of individual applicants.

The principal benefits which the Commission asserted would follow from the elimination of the provisions of the affiliation contract which it found ojectionable were three:

1. That the stations would be freer to serve the needs of their local communities by broadcasting more local programs (*e.g.*, Rep. 65, R. 121);

2. That conditions favorable to the development of additional national networks would be fostered (*e.g.*, Rep. p. 50, R. 106);

3. That the Mutual Broadcasting System would be aided in its competition with Columbia and NBC (*e.g.*, Rep. p. 51-52, R. 107-108).

The regulation which is supposed to foster local programs is 3.104. The form in which the regulation was originally promulgated in May, 1941 (Rep. p. 92, R. 148) might have justified the enthusiastic phrases in which the Commission, in the passage of its Report above cited, emphasized the importance of local program service. It outlawed "option time" altogether. But Mutual petitioned for rehearing on that regulation and, as a result thereof, the Commission eliminated most of the features which would have helped local programs while retaining its full drastic effect in aid of competing networks. All that the final form of the regulation does for local programs is to increase the required notice from 28 to 56 days and to require that the period subject to the option must be measured in clock hours. But during the hours, chosen by the network organization in the four segments of the broadcast day,—which will naturally be the most desirable ones,—local programs may still be displaced to make way for net-

work ones. It is only as against other networks that the option permitted by the regulation is made non-effective. Apparently, therefore, even 3.104 was promulgated more in the interests of Mutual than to require a greater amount of station time being devoted to local programs.

The second professed purpose, of benefitting the listening public through leaving the door open for the emergence of new national networks, is, we submit, illusory.

Chairman Fly at the oral argument on December 3, 1940, after all the evidence had been taken, and the committee appointed by the Commission to examine it had filed its preliminary report, stated (Transcript of Proceedings before the Commission, Ex. A to Defendant's Motion to Dismiss (not included in the printed record but covered by the stipulation at R. 506), pp. 8897-8898):

> "It is dubious as to whether or not, assuming present availability of frequencies, it is dubious whether or not there can be four nation-wide networks. And apparently it would be extremely difficult to have any more."

There are now four national networks. In view of the chairman's opinion, exploration of the question whether even one additional network is economically feasible or otherwise desirable in the public interest, convenience and necessity, and findings based on evidence thereon, should be required before regulations interfering with important existing contractual relationships are promulgated for the purpose of promoting such an objective. But the administrative record discloses none such.

Moreover, it requires no expert experience to perceive that the tendency of Regulations 3.101, 3.102 and 3.104 would not be to encourage the creation of true national networks. What it would encourage would be a prevalence of temporary national "hook-ups".

The distinction between a true network and a mere "hookup", by whatever name called, is thoroughly recognized in the evidence before the Commission. The Digest and Analysis of Evidence prepared by the staff of the Commission stated (pp. 18-19):

> "The principal characteristic which distinguishes a network from a group-selling arrangement, (temporary network (or chain)), is that a network provides to its outlets a reasonable assurance of continuous program service; when commercial programs (defined later in this chapter) are not being transmitted to network outlet stations, such stations usually may draw sustaining programs (defined later in this chapter) from the network program headquarters. The group-selling arrangements, or temporary networks, on the other hand, usually provide only the particular commercial program for which the group was unified; in some singular instances the unification is for the purpose of broadcasting a sustaining program, such as an agricultural information service. These stations always revert to their individual status at the conclusion of each such broadcast."

One of the uncontroverted facts in this proceeding, which appears throughout the Commission's report, is that in every city there are wide disparities in the relative desirability to advertisers of the various broadcasting sta-

tions there located.* The relative attractiveness of individual stations depends largely upon their power, and the frequencies and hours of operation assigned to them. Each of the national networks includes strong stations, weak stations and indifferent stations. In one city the station of one network is the predominant one; in another city that of another network. Other examples of competitively weak stations are those located in sparsely settled areas having slight market appeal, especially if the areas which they serve can also be reached by strong stations in the nearest large cities.

Obviously, if a national advertiser had unlimited choice of stations for a hook-up of say fifty cities he would choose in each of the fifty cities the station having the widest coverage by reason of power, etc. That is what the Commission's regulations here in question would promote. The effect of 3.101 and 3.104 would be to destroy the network's hold, under paragraph 8 and the "option time" provisions of paragraph 2 of the affiliation contract (*supra*, p. 8),

*This is graphically shown in the December, 1941 issue of a publication called "Radio Advertising, Rates and Data", published by Standard Rate and Data Service (not included in printed record but covered by the stipulation at R. 506), which is universally relied on by advertisers and the broadcasting industry (Stanton affid. of Dec. 12, 1941, R. 467). The network data, both national networks and regional networks, appear beginning at page 11 of this publication. Beginning at page 23, and continuing through the balance of the publication, are descriptions of all of the individual stations arranged by states and cities. Taking two examples: In Atlanta, Georgia (p. 75) NBC's Red Network affiliate, WSB, is the only 50,000 watt station in town. On the other hand in Detroit (p. 140) Columbia's affiliate WJR, is the only 50,000 watt station. Examples either way could be multiplied from the data as to different cities.

on the strong stations in its chain; and the effect of 3.102 would be to destroy the hold on the network which the weak stations on the chain have under the reciprocal provision of paragraph 8 of the contract. The inevitable consequence would be that the most lucrative programs would gravitate to the most powerful stations, regardless of their network affiliations, and that the weaker affiliated stations on every network would be relegated to second or third class commercial programs (Paley affid., R. 242). The present incentive to the strong stations to promote good will through broadcasting high-quality sustaining programs would be greatly diminished, and the temptation to run them on a purely money-making basis would be powerful. The inevitable consequence would be to destroy true network service which includes the production of distinguished sustaining programs and other non-remunerative operations, and the building up of the good will of the weaker stations on its chain along with that of the stronger ones.

Even with respect to the third purpose, to aid Mutual in its competition with Columbia and NBC, there is no rational basis for such inflexible and undiscriminating regulations as those here in question.

Certainly Mutual does not need assistance in those cities, of which there are many, where there are now four or more stations, one of which is affiliated with Mutual, provided at least that the coverage of Mutual's station is adequate. Even as to cities where there are less than four stations, and where Mutual has not an affiliate, the statistics presented in the Report (p. 51, R. 107) and in Mutual's affidavits (R. 425-435) are misleading.

It is not necessary that a national network have a station even in every considerable city in the country. If it were, Columbia's network, the NBC's Red and the Blue Network would each comprise two or three hundred affiliates instead of between 100 and 125. There are many considerable cities in which Columbia has no affiliate outlet and the same is true of the other two.

It is common knowledge that a strong station in a favorably located city reaches territories far distant from its transmitter, and that these territories, except in sparsely settled parts of the country, include several other cities. It is also common knowledge that the question of the size of the area which a station can effectively cover is an individual one depending upon many considerations, including, besides power, topography, soil conditions, frequency, location of the transmitter, etc. The Commission states (Rep. p. 52, R. 108) that "in the many areas where all stations are under exclusive contract to NBC or CBS the public is *deprived of the opportunity to hear* Mutual programs". If this was the actual ground of the regulations, it was vital to have findings as to the precise cities and areas in which this condition obtains. There are no such findings. Obviously it is not a reasonable exercise of the licensing power to apply drastic rules in localities where there is no necessity for them.

We submit that the attempt of the Commission to deal, inflexibly and indiscriminately, with all affiliated stations in all localities and all conceivable sets of circumstances, is arbitrary and capricious and has no reasonable relation to the standard of public convenience, interest and necessity established by the Act, however that standard is construed.

SEVENTH: It was error to dismiss the complaint on the merits as a matter of law without requiring the defendants to file an answer or a trial of any issues thereby raised.

Of the three grounds upon which the defendants made their motion to dismiss the complaint or, in the alternative, for summary judgment (R. 469), the only one which survived this Court's decision on the former appeal was the third, that the affidavit upon which the motion was made (R. 469-474) and Exhibit A (being the administrative record of proceedings before the Commission) filed therewith, showed "that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law".

We submit that the defendants are in no event entitled to judgment on the merits as a matter of law. Columbia may well be substantially so entitled. If it were held that the regulations are beyond the statutory authority of the Commission, that would be an end of the case, except for findings satisfying the conventional grounds of equity jurisdiction, which the court below has in substance already found in its action providing for a stay (R. 494-495). Columbia would be entitled to a preliminary injunction, and to a final injunction unless appellees were able successfully to controvert its allegations regarding equity jurisdiction. The same situation would obtain if it were held that, if the Act were construed to confer upon the Commission authority to make these regulations, it would be unconstitutional; or that the Commission, though having statutory authority over the general subject-matter, proceeded upon an erroneous interpretation of the extent of its authority and duty to create competition. But, as to appellees, even

if it were held that the Commission had statutory authority to adopt regulations on the subjects here involved, that it did not misconceive the extent of its authority with respect to enforcing competition, and that the Act as construed to confer such authority is constitutional, the question would still remain whether the regulations were an arbitrary and capricious exercise of that power, and so must be set aside.

As to that issue, we submit that Columbia was entitled to an answer and a trial, and that on such trial the evidence should not be limited to the administrative record.

The proceedings which eventuated in the orders now under review are quite dissimilar from orders making quasi-judicial determinations of defined questions committed by Congress to the judgment of an administrative agency. It is to such determinations that the decisions of this Court (*e.g., Tagg Brothers & Morehead* v. *United States*, 280 U. S. 420) holding that a court will not reweigh the evidence taken before the administrative body or receive additional evidence relating to the propriety of the administrative action, have related. In such cases the issues on judicial review are whether the findings made by the administrative body are adequate to support its decision and whether there was substantial evidence in the administrative record to sustain the findings.

The statutes under which determinations of that character are made require a full hearing before the administrative agency, upon the evidence adduced in which the agency may predicate specific findings of fact. But the Commission in the instant proceeding was acting in a legislative capacity and, as to action of the sort here involved, the Communications Act did not contain any requirement that it hold hearings, or make findings. Substantially speaking, we submit, it made no findings, for its discursive report is

not a substitute for specific determinations of defined issues of fact. The Commission did hold extensive hearings, though not obliged by the statute to do so, but those hearings were similar to those held by committees of Congress to inform itself with respect to the subject-matter of proposed or possible legislation.

At the opening of the hearings, the Chairman stated (Transcript, Ex. A (pp. 13-14)):

> "The purpose and object of this investigation is to develop facts for the information of the Commission and public concerning the matters included in Order No. 37. On the basis of the facts developed in the course of the investigation, appropriate rules and regulations dealing with such matters will be promulgated by the Commission, and if such facts demonstrate the necessity therefor, legislative recommendations made to the Congress by the Commission."

There was no well defined administrative issue upon which testimony could be presented. The notice containing suggested forms of regulations was not given until a year and a half after the testimony was concluded (Complaint, Par. Eighth, R. 7-8, and Ex. F thereto, R. 43). The Commission called upon the networks to present evidence with respect to twenty items (Tr., pp. 9-12; Ex. E to Complaint, R. 38, 40-42). Many of these were irrelevant to the particular regulations which were subsequently adopted. It stated at the outset that cross-examination of witnesses generally would be by the committee and by its staff; that parties desiring to ask questions should, if at all possible, hand such questions to the Commission's counsel in writing and that departure from this procedure would be allowed only where

the committee should decide that the ends of justice will be served thereby (*id.*, p. 13).

The hearings were never formally closed. At the conclusion of the taking of testimony on May 19, 1939, the committee adjourned subject to the call of the committee (Tr., p. 8713).

At the opening of the oral argument on December 2, 1940, the Chairman of the Commission stated (Tr., p. 8716):

> "In Docket No. 5060, in the matter of the Investigation of Chain Broadcasting, the Commission has invited an oral argument which is to be limited to the issues of fact *and policy* raised by the report of the Chain Broadcasting Committee dated June 12, 1940. The Commission has also issued certain questions as to possible regulations to which attention has been particularly invited."

Mr. Taylor, General Counsel for the Commission stated (Tr., pp. 8719, 8720):

> "From the very outset it was recognized, and it was so stated by Chairman McNinch, at the opening of the hearings, that the facts elicited might lead to regulations which the Commission presently has power to promulgate and that also the facts might show the necessity for recommendations to Congress with respect to matters outside the Commission's jurisdiction under existing law."

The Chairman of the Commission, at the hearing on December 3, 1940, expressed the desire to have the parties give attention to the areas of competition and how best the public might get the most out of the industry in terms of healthy competition (Tr., p. 8897), and stated that he did

not think that the Commission ought to be strictly limited to the record (*id.*, p. 8899).

The foregoing sufficiently demonstrates that the hearings which were held were in the nature of exploratory excursions into the field of broadcasting to develop facts upon which the Commission might exercise its regulatory powers or make recommendations to Congress in the event that it concluded that its regulatory powers were insufficient to accomplish what it deemed to be desirable objectives.

There is no similarity whatever between the minutes of such an investigation and an administrative record containing the evidence upon which the Commission makes a quasi-judicial determination.

Moreover, the Commission's Report relies upon facts which were not introduced in evidence at the hearings. These facts are not confined to matters of common knowledge or public record. Thus, for example, the alleged instance of the adverse effect of territorial exclusivity given by Station WBNY at Buffalo in its relation with Mutual (Rep. pp. 58-59, R. 114-115) was contained in a brief filed August 7, 1940 by this station. Again, the changes in Mutual's set-up referred to in the Report (p. 28, R. 84) were not in evidence.

The supplemental opinion on rehearing of October 11, 1941 (Ex. C to Complaint, R. 20-22) refers to the hearings before the Senate Committee on Interstate Commerce held in June, 1941, and conferences during July and August, following the hearings, between the Commission and representatives of Columbia, NBC and Mutual, and states that the Commission had decided to amend three of the chain broadcasting regulations after a careful study, among other things, of the testimony presented before the

Senate Committee, and of the considerations presented at the conferences which followed the hearings.

The fact that the Commission considered matters outside the record shows that it regarded itself as engaging in a legislative inquiry rather than as making a determination upon a record which would conclude interested parties. It is well settled that quasi-judicial determinations may not validly be made except upon evidence introduced at the hearings. *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U. S. 88, 93.

No case suggests that a record so compiled for such a purpose precludes a court from taking testimony as to whether the regulations have any reasonable relation to the statutory authority of the Commission. It was entirely proper for the Commission to take testimony before issuing regulations, but there is nothing in the Communications Act indicating that the review of regulations by the Court must be solely upon the record of such an investigation as was made by the Commission.

The opinion of the court below ignores completely the fundamental difference between administrative proceedings of the sort here involved and those in which it has been held that judicial review is limited to the administrative record. It reverts to the theory, which underlay its decision of the jurisdictional question which this Court reversed, that, because the "determining issues" which the Commission considered in this proceeding were, as it thought, the same as those which would be involved in the application of an affiliated station for renewal of its license, the rules regarding judicial review thereof should also be the same.

Thus it says that, upon an appeal to the Court of Appeals of the District of Columbia under Section 402(b) from the Commission's denial of a renewal of a license, the only issues open would be whether there was substantial support for the findings in the administrative record, and whether the findings were arbitrary or capricious, citing Section 402(e). But the proceedings upon an application for renewal of a license are quasi-judicial in character; they present defined questions of fact as to the application to that particular station of the standard of "public convenience, interest, or necessity"; the Commission, unless it reaches a favorable determination of that question on the face of the application itself, must, under Section 309(a) fix and give notice of time and place for hearing and afford the applicant an opportunity to be heard; and after holding such hearing must make specific findings (*supra*, p. 50, footnote). There are no such requirements for a general investigation by the Commission of the state of the industry designed to guide the taking by it of legislative action by general regulations. And this fact, we submit, necessitates a different scope of judicial review.

CONCLUSION

The decision of the court below should be reversed; and the cause remanded with directions to enter a preliminary injunction, and a final injunction if the requirements of equity jurisdiction are sustained, or, even if this Court should not reach such a conclusion, with directions that appellees be required to answer and that a trial be held on the issues raised thereby.

Respectfully submitted,

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January 19, 1943.

APPENDIX

Sections of Communications Act of 1934:

§ 301. License for radio communication or transmission of energy.

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions; and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter (47 U. S. C., § 301).

§303. Powers and duties of Commission.

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified;

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmtited superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications; or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an opreator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the

judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this chapter;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party (47 U. S. C., § 303).

§ 304. Waiver by license of claims to particular frequency or of ether.

No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise (47 U. S. C., § 304).

§ 307. Licenses; allocation of facilities; terms.

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities

as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * * * * * * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

(e) No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license (47 U. S. C., § 307).

§ 308. Same; application; conditions and restrictions in license for foreign communication.

(a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: *Provided, however,* That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided, further,* That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine cable licenses by section 35 of this title (47 U. S. C., § 308).

§ 309. Same; issuance, renewal, or modification of license; hearings; form; terms; assignment.

(a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect

thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter.

(3) Every license issued under this chapter shall be subject in terms to the right of use or control conferred by section 606 of this title (47 U. S. C., § 309).

§ 311. Same; refusal of license after revocation or to persons guilty of monopoly; liability to prosecution under laws against monopoly.

The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313 of this title, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus,

through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation (47 U. S. C., § 311).

§ 313. Application of antitrust laws to manufacture, sale, and trade in radio apparatus; revocation of licenses.

All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court (47 U. S. C., § 313).

Sections of Radio Act of 1927

SEC. 13. The licensing authority is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person, firm, company, or corporation, or any subsidiary thereof, which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, after this Act takes effect, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person, firm, company, or corporation for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such firm, company, or corporation. (44 Stat. 1162, 1167).

SEC. 15. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date

the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court. (44 Stat. 1162, 1168).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 555

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Respondents

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT

CHARLES E. HUGHES, JR.,
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February 9, 1943.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT

The arguments in the brief for the United States and the Federal Communications Commission (herein called the "Government" Brief) have been so far anticipated in our main brief that no extensive reply is required.

We have sufficiently covered our contention that the subject of the kind of contractual terms which a network organization may make with its affiliated stations as consideration for furnishing them with a dependable supply of network programs is not within the rule-making power of the Commission granted by Section 303 of the Communications Act (Main Brief, pp. 20-39). The part of the Government's argument to which this reply is addressed is that relating to the licensing power of the Commission,

and the Commission's use of the principle of maximum competition as the controlling test in exercise of the licensing power.

THE NATURE OF THE REGULATIONS

The Government argues its case in persistent disregard of what these regulations actually provide. No question is here presented as to the extent to which competitive considerations may enter into the disposition by the Commission of a particular license application. Such expressions as that the Commission "may take into account" the preservation of competition in exercising its licensing authority (Br., p. 52), and equivalent expressions elsewhere in the brief are of no relevance. These regulations provide that *in no circumstances* can a license ever be granted or renewed to a station having an affiliation contract containing specified terms. What the Government must find, therefore, is authority in the statute to make that single fact the sole test of eligibility for a license, overriding all other considerations related to the interests of the listening public.*

*The same fallacy pervades the Government's argument on the other alleged principles upon which it says the Commission's action rested. For example it says (Br., p. 47) that the "principle of licensee responsibility" is a "relevant standard" under the statutory test; and (p. 46) that as far as it knows "it has never heretofore been questioned". But the point is that it has never heretofore been used in an attempt to justify any such regulations as those here involved. In fact, the Commission's Report uses it here only in connection with one of the regulations, 3.105, dealing with the grounds upon which a station may refuse to broadcast network programs. Nowhere in the parts of the Report dealing with competition is it mentioned.

The Government's argument (Br., p. 77, also p. 40) that the regulations are not "iron-bound", and that an applicant having a proscribed form of affiliation contract has still a chance despite the regulations to have his application granted, is an attempt to re-argue a question which was settled in the opinion of this Court on the former appeal. This Court there considered (316 U. S., p. 411, footnote) the passage in the Commission's Report relied upon as indicating that the regulations were mere expressions of "general policy", but concluded (316 U. S., pp. 417, 420):

> "The regulations here prescribe rules which govern the contractual relationships between the stations and the networks. If the applicant for a license has entered into an affiliation contract, the regulations require the Commission to reject his application."
>
> * * *
>
> "Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations."

When that fact appears, the Commission's action is to be automatic. That single fact compels denial of the license whether or not its existence has substantial, or any, effect on the station's service to listeners in the areas which it covers.

Manifestly, no authority to erect such a single controlling test is to be found in the licensing provisions, Sections 307, 308 and 309. Neither is it to be found in the administrative construction (Government Brief, pp. 68-71). In cases of the sort cited by the Government in its footnote to

page 69 the Commission is presented with an application proposing a change in the existing service in a particular case and locality, and decides, on a comparative basis, which of two alternatives, presented by the industry itself, will best serve the listening public. As the Commission stated in *Metropolis Company*, 6 F. C. C. 425, 428-429:

> "In all cases the controlling consideration (granting that the applicant is fully qualified) is the general public need for the radio service offered. In determining whether or not a general public need exists, no hard and fast rule may be followed as circumstances differ in one center of population from another, and manifold disparate elements must be determined in each case. The existence of need may only be determined from the record made in each proceeding."

Such administrative practice has no tendency to support the inflexible regulations here involved. The only administrative practice which does have a bearing is the Commission's renewal year after year of the licenses of Columbia's affiliates. Columbia has had formal affiliation contracts from the very start of its network operations in 1927 (Rep. p. 34, R. 90). From the beginning these have included provisions preventing the affiliates from making their stations available to programs of other networks. The provision enjoining Columbia from furnishing programs to stations other than its affiliates in the same cities dates from 1937 (*id.*, p. 35, R. 91). From the beginning in 1927 Columbia's affiliation contracts also have contained provisions giving Columbia an "option" on the time of the station, the variations being only with respect to the maximum amount of time optioned (*id.*, p. 37, R. 93). The present five-year term of the contract dates from 1936 (*id.*, p. 35, R. 91).

The Federal Communications Commission under the Act of 1934, and its predecessor the Federal Radio Commission under the Act of 1927, have long known of these provisions, and the practice of Columbia and its affiliated stations under them. The licenses of Columbia's affiliated stations have been presented for renewal to the Commission or its predecessor semi-annually until August 1, 1939, and thereafter annually, and have been successively renewed. These provisions of the affiliation contracts and the operations under them have never before been criticized by the Commission or its predecessor (Paley affid., R. 230; Complaint, par. Ninth, R. 9).

SECTION 311

Promulgation of general regulations providing any single controlling test of exercise of the licensing authority is the antithesis of application of the standard of "public convenience, interest or necessity". Authority to do so, therefore, must be found, if at all, in some section specifically prescribing the test. There are only two such provisions in the entire Act, and it is significant that neither refers to the standard. One is Section 310(a) expressly providing that a license shall not be "granted to or held by" alien interests as therein described. The other is Section 311 upon which the Government and the court below rely. Since these sections, in prescribing rigid tests, are exceptions to the flexible standard under which the Commission's general licensing function is exercised, they must be strictly construed.

The reasons why Section 311 cannot be construed to provide the authority required to sustain these regulations

are sufficiently set forth in our Main Brief (pp. 56-68). The argument in the Government Brief rests wholly upon attempted implications from the differences between Section 13 of the 1927 Act and Section 311 of the 1934 Act. It argues (Br., p. 65) that the 1934 amendment did not intend to "alter the entire theory of the 1927 Act by reading competition out of the public-interest standard". The answer is that competition never was in the public-interest standard of the 1927 Act, in any such sense as providing a sole ground for denial of a license. Section 13 provided an exceptional test, to be applied only in the special case described, where there had been a prior adjudication of violation of the anti-trust laws. The additional discretion which was given to the Commission by the 1934 Act was simply to give it authority to conclude, even where there had been a prior adjudication of guilt, that this was not in itself a sufficient ground for denial of a license, if the public-interest standard were deemed satisfied. This view is in harmony with the extract from the Senate Committee report quoted in the footnote at page 64 of the Government Brief. But the prerequisite for any action under that section, prior adjudication, remained unchanged. Here the Commission is attempting to use the section as support for regulations mandatorily requiring denial of licenses where, not only has there been no adjudication, but even the Commission has made no finding, that the anti-trust laws have been infringed. (See our Main Brief, p. 57, footnote.)

The Government says (Br., p. 52) that "The appellants apparently do not question the Commission's conclusion that existing network practices *impair* competition" (italics supplied). This statement wholly misstates our position. The only ground upon which the affiliation contracts could

even be said to "restrain" competition is in the sense that "every agreement concerning trade, every regulation of trade, restrains" (Brandeis, *J.*, in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238). But as this Court said in that opinion "the legality of an agreement or regulation cannot be determined by so simple a test, as whether it *restrains* competition. * * * The true test of legality is whether the restraint is such as merely regulates and *perhaps thereby promotes* competition or whether it is such as may suppress or even destroy competition" (italics supplied). (See also *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360, 361.) Our contention is that the affiliation contracts in fact promote competition in the markets where networks compete *inter sese* and stations compete *inter sese* and that any "restraints" in what the Commission calls the third or network-station market are slight in their effect on the totality of competition in the industry as a whole. (See our Main Brief, p. 54.)

There is nothing in the colloquy between Senator Broussard and Senator Dill which the Government quotes (Br. pp. 56-59) to support an idea that Congress intended that the existence in a contract of a provision which the *Commission* thought in restraint (but not necessarily in unreasonable restraint) of trade was enough to require in and of itself a denial of the license. The statement of Senator Broussard and the te[illegible]am which he quoted show that the primary subject-matter of the colloquy was the special interference problem, which we showed in our Main Brief (pp. 28-34), was the occasion for the enactment of the predecessor of Section 303(i). The only thing in the colloquy which would even superficially aid the Government in its argument on competition generally is Senator Dill's

statement that, "As to creating a monopoly of radio in this country, let me say that this bill absolutely protects the public, so far as it can protect them, by giving the Commission full power to refuse a license to anyone who it believes will not serve the public interest, convenience or necessity". Senator Dill must be considered to have been speaking in that sentence of the consideration which the Commission might give to competitive features generally in passing upon individual applications. To attribute to him, on the basis of such general discussion, an interpretation of the statute as intending that the Commission might make the existence of contractual provisions deemed by *it* to be in restraint of trade a single controlling ground for denial of licenses would be inconsistent with his explicit statements which are quoted at pages 64-65 and 67* of our Main Brief.

THE BEARING OF THE CASE OF *SECURITIES AND EXCHANGE COMMISSION* v. *CHENERY CORPORATION, ET AL.*

The Government (pp. 70-77, 40) cites this Court's decision in *Securities and Exchange Commission* v. *Chenery Corp.*, No. 254, October Term, 1942, decided February 1, 1943, to support the proposition that "it would expedite

*In its brief (footnote, pp. 59-60) the Government seeks to avoid the effect of the second above colloquy (our Main Brief, p. 67), that between Senators Dill and Pittman, by asserting that it has been torn from its context. This colloquy occurred during a lengthy discussion in the Senate (68 Cong. Rec., 69th Cong., 2d Sess. (1927), pp. 3025-3037) of the conference report on H. R. 9971. We submit that when read in the light of the entire discussion this colloquy indicates a full realization in the Senate that the Commission was not intended to have the power of determining whether or not there was a monopoly.

business and further the ends of justice for an administrative body to formulate in general terms the policies which it proposes thereafter to follow".

As to that proposition, everything depends upon the nature of the authority which the administrative body has over the subject-matter of the regulations, and what the regulations themselves provide. We submit that none of the Court's expressions in the *Chenery Corporation* case have any tendency to support what the Commission has attempted to do by general regulations here.

The question in the *Chenery Corporation* case was with respect to the power of the Securities and Exchange Commission, by attaching conditions to its approval of a proposed plan of reorganization, to establish a new policy not theretofore recognized by law or equity as to the purchases of securities by officers and directors. This Court's statement, upon which the appellees here must rely, that

> "Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which this order here was a particular application, the problem for our consideration would have been very different"

thus related to a particular problem of policy which, if within the Commission's competence at all, should be established by rule. In the *Chenery Corporation* case the Commission had power to pass on the terms of the reorganization plan. The question was whether the particular condition it sought to exact was within that authority. But here the Communications Act contained no provision that a contract of affiliation between a licensed station and a national network organization should not be valid unless the Commission should approve its terms as in the public interest.

There was therefore no foundation for the promulgation of rules defining the terms which would or would not be permitted.

The real bearing of the *Chenery Corporation* case on this one is its holding that the order could not be upheld because the report of the Securities and Exchange Commission showed that it was grounded upon erroneous reasons. This fully supports the proposition advanced in Point Fourth of our Main Brief (pp. 71-79). This Court said:

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.
>
> * * * * * * * * *
>
> "We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."

The Government's sole answer to Point Fourth in our Main Brief is the mere assertion (Br., p. 68, footnote) that the Report does not show that the Commission proceeded upon the grounds which we contend it did. It refers to pages in the Report in which, as to the subject-matter of each regulation, the Commission says that a station "does not operate in the public interest" (or some equivalent language) if it does such and such things.

It is true that in each sentence referred to the Commission did use words appropriate to a finding which, if it stood alone, might have been deemed to have been authorized by the statute. So in the *Chenery Corporation* case, the Securities and Exchange Commission made a

generally phrased finding that the plan of reorganization was not "fair and equitable" or was "detrimental to the interests of investors". So also in *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, and the other authorities cited at pages 77-78 of our Main Brief, the Interstate Commerce Commission made in words a finding, in the language of the applicable statute, that the rates were "unreasonable". But in all of those cases this Court found that such conclusory expressions took their meaning from the reasons advanced in detail in the parts of the report where the commission explained the reasons which impelled it to reach those conclusions. Finding those grounds to be erroneous, it concluded that the commission had made no real determination of the questions committed to it under the Act, and its order accordingly could not be upheld.

Respectfully submitted,

CHARLES E. HUGHES, JR.,
ALLEN S. HUBBARD,
HAROLD L. SMITH,
WRIGHT TISDALE,
Counsel for Appellant.

February 9, 1943.

FILE COPY

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Supreme Court of the United States

OCTOBER TERM, 1942

No. 555

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Respondents.

MOTION FOR TEMPORARY RESTRAINING ORDER, NOTICE OF MOTION AND AFFIDAVIT IN SUPPORT OF MOTION

CHARLES E. HUGHES, JR.,
1 Wall Street,
New York, N. Y.
Counsel for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1942

COLUMBIA BROADCASTING SYSTEM, INC., *Appellant*, v. THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Respondents.*	No. 555

MOTION FOR TEMPORARY RESTRAINING ORDER

Upon the annexed affidavit of Paul W. Kesten, sworn to February 8th, 1943, the complaint and all the affidavits and other papers filed herein and set forth in the transcript of record on this appeal, and all the proceedings heretofore had herein, the appellant moves this Court for an order suspending, and restraining the operation, enforcement or execution of the order of the Federal Communications Commission, one of the respondents herein, in Docket No. 5000, made May 2, 1941, as amended October 11, 1941, the order involved on said appeal, until ten days after the filing in the District Court of the mandate upon this Court's decision on said appeal; and for such other and further relief as to this Court may seem just.

Dated, February 8th, 1943.

CHARLES E. HUGHES, JR.,
1 Wall Street,
New York, N. Y.,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Respondents.

No. 555

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that the above motion will be submitted to the Court at the Courthouse of the Supreme Court of the United States, Washington, D. C., on the day on which the appeal herein is called for argument, at 12 o'clock noon on that day or as soon thereafter as said motion can be submitted.

Dated, February 8th, 1943.

CHARLES E. HUGHES, JR.,
1 Wall Street,
New York, N. Y.,
Counsel for Appellant.

To:

CHARLES FAHY, Esq.,
Solicitor General,
Department of Justice,
Washington, D. C.

CHARLES R. DENNY, Esq.,
General Counsel,
Federal Communications Commission,
Washington, D. C.

LOUIS G. CALDWELL, Esq.,
Counsel for Mutual Broadcasting System, Inc.,
Washington, D. C.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

COLUMBIA BROADCASTING SYSTEM, INC., *Appellant*, v. THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Respondents.*	No. 555

AFFIDAVIT IN SUPPORT OF MOTION

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
CITY, COUNTY AND STATE OF NEW YORK; } ss.:

PAUL W. KESTEN, being duly sworn, deposes and says:

I am Vice-President and General Manager of Columbia Broadcasting System, Inc., the appellant herein.

This is an appeal from a district court decree dismissing a suit by appellant to set aside, annul and permanently enjoin the enforcement of orders of the Federal Communications Commission (hereinafter called the "Commission") promulgating regulations applicable to radio stations engaged in chain or network broadcasting. For a description of the suit I respectfully refer the Court to the Statement in appellant's brief on this appeal.

The object of appellant's annexed motion, in support of which this affidavit is made, is to restrain enforcement of the regulations for an appropriate period after April 1, 1943 or the decision of this Court on this appeal, whichever is earlier. The District Court on November 16, 1942, entered an order accompanying its opinion rendered on that

date restraining enforcement of the regulations until February 1, 1943, or the argument of the appeal, whichever was earlier (R. 495).

Following the allowance of the appeal, the Commission was requested to enter into a stipulation which would suspend the orders promulgating the regulations until ten days after the determination of this appeal or the termination of this term of this Court, whichever should occur earlier. The Commission refused to enter into such a stipulation, but on January 20, 1943, by telegram, advised the appellant as follows:

> "The Commission today entered the following minute: Quote the Commission today suspended until April 1, 1943, or the date of the decision by the Supreme Court of the United States in cases Nos. 554 and 555, whichever is earlier, the effectiveness of the Commission's order of May 2, 1941 in Docket No. 5060, as last amended October 11, 1941. Unquote."

The present motion was made necessary by the failure of either the District Court's temporary restraining order or the minute quoted in the telegram referred to above to provide appellant with protection from enforcement of the regulations for the period from April 1, 1943 until the decision of this appeal, if the appeal is not decided prior to April 1, 1943, and for a reasonable period after the decision of the appeal.

I respectfully submit that, for the following reasons, extension of the restraint upon enforcement of the regulations for ten days after the filing in the District Court of the mandate upon this Court's decision on the appeal would be appropriate in this case, regardless of whether the decision below is reversed or affirmed (*Board of Trade of the City of Chicago* v. *Clyne*, 260 U. S. 704, 262 U. S. 1).

If the decision below is reversed, it is clear that appellant should be protected by temporary restraining order and injunction until final determination of the action.

The reasons for the granting of such relief as is requested herein are set forth in the findings of fact and conclusions of law upon which the restraining order of the District Court was based as follows (R. 494-495):

"FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. That if the Federal Communications Commission, pending the plaintiff's appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; the plaintiff will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two and one half months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to the plaintiff arising from enforcement, if the conditions mentioned in the First Finding exist.

That the plaintiff is entitled to a stay pending its appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Com-

mission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of February, 1943, whichever is earlier."

Facts amply supporting these findings and conclusions as to appellant's right to a stay pending the appeal are fully set forth in the affidavits of William S. Paley, verified February 25, 1942 (which was included in the record (pp. 474-478) before this Court in *Columbia Broadcasting System, Inc.* v. *United States of America, et al.*, October Term, 1941, No. 1026) and October 30, 1941 (R. 219, 245-248), and the affidavits of Herbert V. Akerberg, verified October 29, 1941 (R. 255-280) and January 5, 1942 (R. 301, 303-310), to which I respectfully refer the Court in lieu of a repetition of such facts in this affidavit. The danger of irreparable injury to Columbia if enforcement of the regulations is not restrained is as great now as it was when those affidavits were made.

If the decision below is affirmed, appellant should be given a reasonable opportunity to make whatever arrangements are necessary with its 115 affiliated stations.

WHEREFORE appellant prays that this Court enter an order granting the relief set forth in the accompanying motion.

PAUL W. KESTEN

Subscribed and sworn to before me
this 8th day of February, 1943.

JAMES D. MCCAULEY
Attorney and Counsellor-at-Law
Office Address:—One Wall St., N. Y. City
Residing in N. Y. Co. No. 5, Reg. No. 3 Mc 160
Cert. filed in Kings Co. No. 2, Reg. No. 3004
Cert. filed in Queens Co. No. 54, Reg. No. 7981 A
Commission Expires March 30, 1943

[NOTARIAL SEAL]